

# The Unconstitutionality of Government Propaganda

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*Government propaganda—the government’s deliberate dissemination of false claims on matters of public interest—has increasingly become a source of concern in the United States. Not only does the current presidential administration disseminate propaganda at a rate unprecedented in the modern era, so that Americans now live in an age of government-created “alternative facts,” but the internet and social media have made it possible to find receptive audiences with alarming speed and accuracy. This surge of government propaganda poses troubling questions for the health of our democracy, which requires political accountability and the valid consent of the governed to thrive.*

*Although the crucial role that speech plays in our democratic self-rule is a major reason it merits First Amendment protection, the Free Speech Clause as currently interpreted has no part to play in combating government propaganda. Under the government speech doctrine, the Free Speech Clause does not apply to government speech, including government propaganda. It is time to revisit that conclusion.*

*This Article argues that government propaganda, although government speech, ought to be regarded as covered by, and in violation of, the Free Speech Clause. Admittedly, this proposal is radical for two reasons. First, with few exceptions, the free speech tradition in the United States is averse to regulating harmful speech. Such regulations are believed to invite government abuse and to chill private speech. However, neither of these concerns are triggered when the government is the object rather than the enforcer of speech regulations. The second radical aspect of this proposal is bringing government speech into the purview of the Free Speech Clause. Nevertheless, government propaganda sufficiently undermines the core goals of free speech such that the Free Speech Clause ought to address it.*

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## I. INTRODUCTION

While much recent scholarship has focused on the problems associated with propaganda by private actors or foreign governments,<sup>1</sup> less attention has been paid to propaganda issuing from our own government, and whether the Constitution has any role to play in combating it. The underlying assumption is that the Free Speech Clause does not, and that however destructive government propaganda may be, the remedy lies elsewhere.<sup>2</sup> I want to challenge this assumption. In this Article, I argue that government propaganda violates the First Amendment. Government propaganda is speech that undermines the core goals of the Free Speech Clause, and therefore the Free Speech Clause ought to address it.

Definitions of propaganda differ, and some, such as the attempt to persuade the public through the use of mass media, may even lack negative connotations.<sup>3</sup> Usually, however, propaganda's key characteristic is manipulateness.<sup>4</sup> Although "manipulative" is another contested term, with propaganda it is typically defined as intentionally undermining reasoned analysis.<sup>5</sup> "To be

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<sup>1</sup> See generally Jane R. Bambauer, *Snake Oil Speech*, 93 WASH. L. REV. 73 (2018); Donald L. Beschle, *Fake News, Deliberate Lies, and the First Amendment*, 44 U. DAYTON L. REV. 209 (2019); Erwin Chemerinsky, *False Speech and the First Amendment*, 71 OKLA. L. REV. 1 (2018); David S. Han, Essay, *Conspiracy Theories and the Marketplace of Facts*, 16 FIRST AMEND. L. REV. 178 (2017) [hereinafter Han, *Conspiracy Theories*]; Richard L. Hasen, *Cheap Speech and What It Has Done (to American Democracy)*, 16 FIRST AMEND. L. REV. 200 (2018) [hereinafter Hasen, *Cheap Speech*]; Lili Levi, *Real "Fake News" and Fake "Fake News"*, 16 FIRST AMEND. L. REV. 232 (2018); Philip M. Napoli, *What If More Speech Is No Longer the Solution? First Amendment Theory Meets Fake News and the Filter Bubble*, 70 FED. COMM. L.J. 55 (2018); Jessica Stone-Erdman, *Just the (Alternative) Facts, Ma'am: The Status of Fake News Under the First Amendment*, 16 FIRST AMEND. L. REV. 410 (2018); Nabihah Syed, *Real Talk About Fake News: Towards a Better Theory for Platform Governance*, 127 YALE L.J.F. 337 (2017); Jonathan D. Varat, *Truth, Courage, and Other Human Dispositions: Reflections on Falsehoods and the First Amendment*, 71 OKLA. L. REV. 35 (2018); Mark Verstraete & Derek E. Bambauer, *Ecosystem of Distrust*, 16 FIRST AMEND. L. REV. 129 (2018); Ari Ezra Waldman, *The Marketplace of Fake News*, 20 U. PA. J. CONST. L. 845 (2018) [hereinafter Waldman, *Marketplace Fake News*]; Abby K. Wood & Ann M. Ravel, *Fool Me Once: Regulating "Fake News" and Other Online Advertising*, 91 S. CAL. L. REV. 1223 (2018); Allison Denton, Note, *Fake News: The Legality of the Russian 2016 Facebook Influence Campaign*, 37 B.U. INT'L L.J. 183 (2019).

<sup>2</sup> See *infra* Part II (describing the government speech doctrine).

<sup>3</sup> See JASON STANLEY, *HOW PROPAGANDA WORKS* 38 (2015) (noting that propaganda may have a neutral as well as a pejorative sense).

<sup>4</sup> Sean Illing, *How Propaganda Works in the Digital Age*, VOX, <https://www.vox.com/policy-and-politics/2019/10/18/20898584/fox-news-trump-propaganda-jason-stanley> (on file with the *Ohio State Law Journal*) [hereinafter Illing, *Propaganda Digital Age*] (quoting Jason Stanley: "Propaganda is the use of images or language to manipulate people").

<sup>5</sup> See Beth S. Bennett & Sean Patrick O'Rourke, *A Prolegomenon to the Future Study of Rhetoric and Propaganda: Critical Foundations*, in READINGS IN PROPAGANDA AND

effective, propaganda must constantly short-circuit all thought and decision.”<sup>6</sup> In this Article, I focus on manipulation by lying, and define government propaganda as the government’s knowing or reckless propagation of verifiably false or misleading statements of fact on matters of public concern.<sup>7</sup>

Although people more often associate government propaganda with authoritarian regimes than with contemporary democracies, government propaganda has increasingly become a source of concern in the United States for two reasons. First, whether by tweets, proclamations, or press conferences, the current presidential administration disseminates propaganda at a rate unprecedented in the modern era.<sup>8</sup> Americans now live in an age of government-created “alternative facts,”<sup>9</sup> where outright falsehoods, persistent attacks on the press, as well as a regular stream of disinformation from multiple government speakers and agencies, have become the norm.<sup>10</sup>

Second, the internet and particularly social media have made it easier than ever to not only quickly spread government propaganda but also to target it to receptive audiences.<sup>11</sup> The capacity to share content with a click of a button, the increased likelihood of lies going viral, information bubbles, and algorithms all contribute to this widespread and targeted distribution.

This propaganda wreaks havoc on our democracy. Democratic self-governance means that government officials rule with the consent of the governed, which is usually granted or withheld at the voting booth.<sup>12</sup> Valid consent requires full information about the government’s policy choices as well

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PERSUASION: NEW AND CLASSIC ESSAYS 51, 68 (Garth S. Jowett & Victoria O’Donnell eds., 2006) (“Propaganda usually seeks to short-circuit a thinking response.”).

<sup>6</sup>Jacques Ellul, *The Characteristics of Propaganda*, in READINGS IN PROPAGANDA AND PERSUASION: NEW AND CLASSIC ESSAYS 1, 17 (Garth S. Jowett & Victoria O’Donnell eds., 2006).

<sup>7</sup>See *infra* Part III.A.2.

<sup>8</sup>See *infra* Part III.B.1; see also Maria Konnikova, *Trump’s Lies vs. Your Brain*, POLITICO MAG. (Jan./Feb. 2017), <https://www.politico.com/magazine/story/2017/01/donald-trump-lies-liar-effect-brain-214658> [<https://perma.cc/UC69-EZPC>] (“All Presidents lie . . . But Donald Trump is in a different category. The sheer frequency, spontaneity and seeming irrelevance of his lies have no precedent.”).

<sup>9</sup>Cf. Yochai Benkler, Robert Faris, Hal Roberts, & Ethan Zuckerman, *Study: Breitbart-Led Right-Wing Media Ecosystem Altered Broader Media Agenda*, COLUM. JOURNALISM REV. (Mar. 3, 2017), <https://www.cjr.org/analysis/breitbart-media-trump-harvard-study.php> [<https://perma.cc/3MN3-73ZN>] [hereinafter Benkler et al., *Study*] (describing current media environment as “a propaganda and disinformation-rich environment”).

<sup>10</sup>See *infra* Part III.B.1.

<sup>11</sup>See *infra* Part III.B.2.

<sup>12</sup>N.Y. Times Co. v. Sullivan, 376 U.S. 254, 275 n.15 (1964) (“[T]he right of electing the members of the government constitutes more particularly the essence of a free and responsible government.”) (citation omitted).

as complete and accurate information about official conduct.<sup>13</sup> Speech, including government speech, usually strengthens democratic decision-making: a free flow of truthful information ensures that voters can keep up on policy issues and keep tabs on the government—often with the help of the press—and thereby make informed political decisions.<sup>14</sup> The crucial role that speech plays in our democracy is a major reason it merits constitutional protection.<sup>15</sup>

Government propaganda, however, disrupts this process. First, the onslaught of government propaganda—not just misleading spin but disinformation—muddies the marketplace of ideas and makes it harder to unearth the truth.<sup>16</sup> Second, government propaganda, and the destabilization of truth it causes, makes it harder to believe the truth when it does see the light of day.<sup>17</sup> Certainly, the ability of the press to perform its watchdog function has been undercut by propaganda targeted at it and by propaganda in general.<sup>18</sup> The end result is that government propaganda leads citizens to make decisions based on false information.<sup>19</sup>

Although the proliferation of government propaganda has significant consequences on democratic self-rule, the Free Speech Clause, as currently interpreted, has no role to play in checking it. Under the government speech doctrine, the Free Speech Clause simply does not apply.<sup>20</sup> When the government speaks, the Free Speech Clause does not limit what it says because the Free Speech Clause does not reach it.<sup>21</sup> “The Free Speech Clause restricts

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<sup>13</sup> *Id.* (“The value and efficacy of this right [to elect members of the government] depends on the knowledge of the comparative merits and demerits of the candidates for public trust[.]”) (citation omitted).

<sup>14</sup> *See, e.g.,* *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776–77 (1978) (citation omitted) (“[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.”) (citation omitted).

<sup>15</sup> The three most common justifications for constitutional protection of free speech are: to promote democratic self-governance; to facilitate a marketplace of ideas, including political ideas; and to further individual self-expression and autonomy. NOAH R. FELDMAN & KATHLEEN M. SULLIVAN, *CONSTITUTIONAL LAW* 935–39 (Saul Levmore et al. eds., 20th ed. 2019).

<sup>16</sup> *See infra* Part IV.

<sup>17</sup> *See infra* Part IV.

<sup>18</sup> *See infra* Part IV.A.

<sup>19</sup> I am not arguing that our government is the only source of propaganda. It clearly is not. *See, e.g.,* Olivia Solon & Sabrina Siddiqui, *Russia-Backed Facebook Posts ‘Reached 126m Americans’ During US Election*, *GUARDIAN* (Oct. 30, 2017), <https://www.theguardian.com/technology/2017/oct/30/facebook-russia-fake-accounts-126-million> [<https://perma.cc/Y7RL-P38M>] (reporting Facebook testimony to Senate Judiciary Committee that Russian fake news reached as many as 126 million Americans, which is roughly half of eligible voters). But U.S. government propaganda is a major and influential source.

<sup>20</sup> *See infra* Part II.

<sup>21</sup> *Id.*

government regulation of private speech; it does not regulate government speech.”<sup>22</sup> It is time to revisit that conclusion.<sup>23</sup>

To combat government propaganda, the Free Speech Clause should ban it. Admittedly, this proposal is radical for two reasons. First, with few exceptions, the free speech tradition in the United States is averse to regulating harmful speech.<sup>24</sup> Such regulations, even if inspired by benign motives, are believed to invite government abuse and to chill private speech.<sup>25</sup> However, neither of these problems arise when the government is the target rather than the enforcer of speech regulations.

The second radical aspect of this proposal is bringing government speech into the purview of the Free Speech Clause. Nevertheless, government propaganda sufficiently undermines two of free speech’s core functions,<sup>26</sup> namely promoting a marketplace of ideas in our search for truth<sup>27</sup> and facilitating democratic self-governance,<sup>28</sup> such that the Free Speech Clause ought to cover it.<sup>29</sup> In short, because the government’s propagandistic speech

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<sup>22</sup> *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009).

<sup>23</sup> I am not the first to propose Free Speech Clause limits on government speech. Helen Norton, for example, has argued that government lies “violate the Free Speech Clause when they are . . . the functional equivalent of the government’s direct regulation of that expressive activity.” Helen Norton, *The Government’s Lies and the Constitution*, 91 IND. L.J. 73, 76 (2015) [hereinafter Norton, *The Government’s Lies*]. My approach differs in that I argue that government speech may be unconstitutional even if it is not the functional equivalent of government censorship of private speech. Instead, government speech qua government speech may be subject to Free Speech Clause limits.

<sup>24</sup> There are a few narrow and historically-based categories of speech that are deemed outside the Free Speech Clause. *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 791 (2011) (“These limited areas—such as obscenity, incitement, and fighting words—represent ‘well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem[.]’ Last Term, in *Stevens*, we held that new categories of unprotected speech may not be added to the list[.]”) (citations omitted).

<sup>25</sup> See *infra* Part V.B.

<sup>26</sup> A third is promoting individual autonomy. See, e.g., C. Edwin Baker, *Harm, Liberty, and Free Speech*, 70 S. CAL. L. REV. 979, 980 (1997) [hereinafter Baker, *Harm*] (“Speech can relate to autonomy in two ways: as itself an exercise of autonomy or as an informational resource arguably essential for meaningful exercise of autonomy.”).

<sup>27</sup> See, e.g., *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . . . That at any rate is the theory of our Constitution.”).

<sup>28</sup> *Janus v. Am. Fed’n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464 (2018) (“Free speech serves many ends. It is essential to our democratic form of government, and it furthers the search for truth.”) (citation omitted); *Garrison v. La.*, 379 U.S. 64, 74–75 (1964) (“[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.”).

<sup>29</sup> If speech is “covered” by the Free Speech Clause, then its regulation triggers free speech scrutiny; if speech is “protected” by the Free Speech Clause, then the government cannot ban it or compel it. See FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 89–92 (1982).

compromises free speech goals, government propaganda should trigger the Free Speech Clause.

In addition to the Introduction, this Article has four parts. Part II summarizes the current government speech doctrine, which holds that the Free Speech Clause does not apply to government speech. Part III provides a definition of government propaganda grounded in existing free speech doctrine, and then details how both the quantity and reach of government propaganda is unprecedented in the current administration. Part IV draws on social science to explain the effectiveness of government propaganda in persuading people and in destabilizing the truth, and describes how government propaganda undermines basic democratic processes. Part V examines some issues raised by a First Amendment right against government propaganda. It addresses questions about the scope of the right, the risks of regulating speech, and why the traditional free speech alternatives fail. It also offers a justification for the Article's central claim that government propaganda, rather than lying outside the Free Speech Clause, in fact violates it.<sup>30</sup>

## II. GOVERNMENT SPEECH DOCTRINE

A core tenet of the Free Speech Clause is that the government may not censor private speakers because of their viewpoints.<sup>31</sup> Regulations that discriminate against viewpoint are subject to strict scrutiny and are presumed unconstitutional.<sup>32</sup> Nevertheless, the government may limit the viewpoints of its own speech because under the government speech doctrine, “‘government speech’ escapes First Amendment strictures.”<sup>33</sup> In short, the primary rule of the government speech doctrine is fairly straightforward: if the speech is deemed to be the government's, then the Free Speech Clause does not apply.<sup>34</sup>

The starting assumption for the government speech doctrine is that the government cannot function if it is unable to control the content of its own

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<sup>30</sup> The Article focuses on how the Free Speech Clause itself might be mobilized, though obviously solutions might be found elsewhere as well.

<sup>31</sup> *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828–29 (1995) (“It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys. . . . When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.”).

<sup>32</sup> *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 384 (1992). Apart from a few categories of unprotected speech, *see supra* note 24, content-based regulations trigger rigorous strict scrutiny. *See R.A.V.*, 505 U.S. at 395–96. Even with unprotected categories of speech, the government may not impose viewpoint-based regulations. *Id.* at 383–84. Moreover, “[c]ontent-based regulations are presumptively invalid.” *Id.* at 382 (citation omitted).

<sup>33</sup> *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2235 (2015) (citation omitted).

<sup>34</sup> *Matal v. Tam*, 137 S. Ct. 1744, 1757 (2017) (“[O]ur cases recognize that ‘[t]he Free Speech Clause . . . does not regulate government speech.’”) (citation omitted).

speech.<sup>35</sup> Government officials are chosen because of their political platforms, and implementing their policy choices might require viewpoint discrimination. As the Supreme Court observed, “How could a city government create a successful recycling program if officials, when writing householders asking them to recycle cans and bottles, had to include in the letter a long plea from the local trash disposal enterprise demanding the contrary?”<sup>36</sup> Similarly, the Court continued, how could the government effectively encourage vaccinations if it also had to support anti-vaxxers?<sup>37</sup> The government cannot do the job it was elected to do without the freedom to decide what to say and what not to say.<sup>38</sup>

The 1991 *Rust v. Sullivan*<sup>39</sup> decision is now viewed as one of the first government speech cases. In *Rust*, doctors who received Title X family planning funds challenged a regulation forbidding them from discussing abortion with their patients.<sup>40</sup> The Supreme Court upheld the “gag rule” on the ground that the government had “merely chosen to fund one activity to the exclusion of the other.”<sup>41</sup> While the term “government speech” appeared nowhere in the decision, the Court a decade later identified *Rust* as a government speech decision, holding that *Rust* established “that viewpoint-based funding decisions can be sustained in instances in which the government itself is the speaker.”<sup>42</sup>

Two recent cases—*Pleasant Grove City, Utah v. Summum* (2009)<sup>43</sup> and *Walker v. Texas Division, Sons of Confederate Veterans, Inc.* (2015)<sup>44</sup>—have cemented the government speech doctrine. In *Pleasant Grove City*, a small religious group argued that Pleasant Grove City committed unconstitutional viewpoint discrimination when it rejected the group’s gift of a donated monument for a park that contained several previously donated monuments.<sup>45</sup> The Supreme Court rejected the group’s claim, holding that monuments in a public park constituted government speech and therefore the government was

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<sup>35</sup> *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2246 (2015) (“[I]t is not easy to imagine how government could function if it lacked th[e] freedom’ to select the messages it wishes to convey.”) (citing *Pleasant Grove City v. Summum*, 555 U.S. 460, 468 (2009)).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *See id.* (“But, as a general matter, when the government speaks it is entitled to promote a program, to espouse a policy, or to take a position. In doing so, it represents its citizens and it carries out its duties on their behalf.”).

<sup>39</sup> *Rust v. Sullivan*, 500 U.S. 173 (1991).

<sup>40</sup> *Id.* at 178–79, 181.

<sup>41</sup> *Id.* at 193. On this view, the government was not suppressing a viewpoint but merely prohibiting subsidized doctors from “engaging in activities outside of the project’s scope.” *Id.* at 194.

<sup>42</sup> *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001).

<sup>43</sup> *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009).

<sup>44</sup> *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015).

<sup>45</sup> *Pleasant Grove City*, 555 U.S. at 465–66.



free to accept a Ten Commandments monument but decline the Summums' Seven Aphorisms monument.<sup>46</sup>

In *Walker*, the Sons of Confederate Veterans argued that Texas's refusal to manufacture its proposed specialty license plate bearing a confederate flag, despite offering dozens of other specialty license plates, amounted to unconstitutional viewpoint discrimination.<sup>47</sup> The Supreme Court held that specialty license plates were government speech, and therefore the government was free to reject the Sons of Confederate Veterans plate.<sup>48</sup> "When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says."<sup>49</sup>

In both cases, the Supreme Court considered several factors when deciding whether speech fell on the government side as opposed to private side of the divide. The Court asked whether historically the park monuments and license plates had been vehicles for government speech; who controlled the speech; and to whom observers attributed the speech.<sup>50</sup> The Court held that the answers favored the government with public-park monuments and state-issued specialty license plates.<sup>51</sup> "Governments have used monuments to speak to the public since ancient times,"<sup>52</sup> and apparently license plates since modern times;<sup>53</sup> the government had direct control over which monuments and messages to accept;<sup>54</sup> and both park monuments and specialty license plates are "closely identified in the public mind" with the government.<sup>55</sup>

In contrast, the Supreme Court held that trademarks registered by the Patent and Trademark Office in favor of private business owners "share none of these characteristics."<sup>56</sup> According to the Court, trademarks have not traditionally conveyed a government message; the government does not control them; and no one associates trademarks with the government.<sup>57</sup> Consequently, trademarks,

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<sup>46</sup> *Id.* at 472–73.

<sup>47</sup> *Walker*, 135 S. Ct. at 2245.

<sup>48</sup> *Id.* at 2253.

<sup>49</sup> *Id.* at 2245 (citing *Pleasant Grove City*, 555 U.S. at 467–68).

<sup>50</sup> *Walker*, 135 S. Ct. at 2248–49; *Pleasant Grove City*, 555 U.S. at 470–73.

<sup>51</sup> See *Walker*, 135 S. Ct. at 2253; *Pleasant Grove City*, 555 U.S. at 481.

<sup>52</sup> *Matal v. Tam*, 137 S. Ct. 1744, 1759 (2017).

<sup>53</sup> *Walker*, 135 S. Ct. at 2248 ("First, the history of license plates shows that . . . they long have communicated messages from the States.").

<sup>54</sup> *Walker*, 135 S. Ct. at 2249 ("Texas maintains direct control over the messages conveyed on its specialty plates."); *Pleasant Grove City*, 555 U.S. at 473 ("[T]he City has 'effectively controlled' the messages sent by the monuments in the Park by exercising 'final approval authority' over their selection.").

<sup>55</sup> *Matal*, 137 S. Ct. at 1760 ("[L]icense plates 'are often closely identified in the public mind' with the State, since they are manufactured and owned by the State, generally designed by the State, and serve as a form of 'government ID.'" (citing *Walker*, 135 S. Ct. at 2249); *Pleasant Grove City*, 555 U.S. at 472 ("Public parks are often closely identified in the public mind with the government unit that owns the land.").

<sup>56</sup> *Matal*, 137 S. Ct. at 1760.

<sup>57</sup> *Id.*

which give private individuals the right to control the use of a certain mark,<sup>58</sup> are private speech.<sup>59</sup>

The line separating government speech from private speech is not always a bright line.<sup>60</sup> Although designated private speech, the government exercises some control over trademarks given that it is the one that accepts or rejects their registration.<sup>61</sup> Meanwhile, although deemed governmental, the messages of park monuments could also be identified with the private donors on the plaques, and the messages of the specialty license plates with the private drivers who pay extra to affix them to their cars.<sup>62</sup> Consequently, speech with both private and government involvement may not be so readily classified as private speech or government speech.<sup>63</sup>

Identifying government speech is easier when the speech originates with a government body or a government official. It is practically redundant to argue that published government reports and government officials' public comments about their policies have historically been used to convey a government message to the public, and they surely have been traditionally controlled by and equated with the government.

As it happens, the *Sumnum-Walker* factors<sup>64</sup> may not be necessary to categorize speech by government representatives. Since the Supreme Court's decision in *Garcetti v. Ceballos*,<sup>65</sup> there has been a clear rule regarding government employee speech: if the government employees' speech is "pursuant to . . . official duties," it is essentially the government's speech, and therefore not covered by the Free Speech Clause.<sup>66</sup> Thus, a government employee's speech about their official duties, especially when made to the public, is government speech.

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<sup>58</sup> *Id.* at 1751.

<sup>59</sup> *Id.* at 1760 ("Trademarks are private, not government, speech.").

<sup>60</sup> Daniel J. Hemel & Lisa Larrimore Ouellette, *Public Perceptions of Government Speech*, 2017 SUP. CT. REV. 33, 34 ("[T]he line between 'government speech' and private expression is often fuzzy.").

<sup>61</sup> See *Matal*, 137 S. Ct. at 1753. Moreover, it's debatable whether the government really conveys no message when it protects a racist trademark.

<sup>62</sup> *Cf.* Hemel & Ouellette, *supra* note 60, at 36 ("The Court's statement in *Sumnum* that members of the public 'routinely' interpret monuments on government land as government speech rested on nothing more than *ipse dixit*.").

<sup>63</sup> See generally Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605 (2008) [hereinafter Corbin, *Mixed Speech*].

<sup>64</sup> See *supra* note 50 and accompanying text.

<sup>65</sup> *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

<sup>66</sup> *Id.* at 436 (Souter, J., dissenting) ("The majority accepts the fallacy . . . that any statement made within the scope of public employment is (or should be treated as) the government's own speech[.]"). Previously, the Court would weigh the public's interest in hearing speech on matters of public concern against the government employer's interest in avoiding disruption in the workplace. See *City of San Diego v. Roe*, 543 U.S. 77, 82–83 (2004) (describing the Pickering-Connick balancing test).

Although government speech is not subject to the Free Speech Clause, it is not without limits. Other clauses might constrain what the government says, such as the Equal Protection Clause, which bars the government from advocating a caste system based on racial or ethnic identity,<sup>67</sup> or the Establishment Clause, which bars the government from advocating a caste system based on religious identity.<sup>68</sup> The Due Process Clause, too, might serve as a limit.<sup>69</sup>

According to the Supreme Court, however, the primary restraint on government speech is the democratic process: “It is the democratic electoral process that first and foremost provides a check on government speech.”<sup>70</sup> By its vote, the electorate supports or rejects the government’s messages. The government may discriminate based upon viewpoint in its own speech in part because it is “ultimately ‘accountable to the electorate and the political process for its advocacy.’ ‘If the citizenry objects, newly elected officials later could espouse some different or contrary position.’”<sup>71</sup>

The bottom line of the government speech doctrine, then, is that the Free Speech Clause was designed to protect private speech from the government, not government speech from the government. The government can choose its own words, and if the electorate does not like what the government says, it can act to change the government.

### III. GOVERNMENT PROPAGANDA

Because the Free Speech Clause does not reach government speech, it also does not reach government propaganda. What exactly do I mean by government propaganda, and how widespread it is in the United States? Part III answers those questions. Part III.A. starts with a general overview of propaganda, and then presents a definition of government propaganda grounded in existing doctrine. Specifically, it defines government propaganda as a government speaker’s false or misleading statement of fact on a matter of public concern made with actual malice. Part III.B. details the unprecedented levels of both the amount and reach of government propaganda in the United States.

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<sup>67</sup> Cf. *Plyler v. Doe*, 457 U.S. 202, 213 (1982) (“The Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation.”).

<sup>68</sup> See *Pleasant Grove City v. Summum*, 555 U.S. 460, 468 (2009) (“[G]overnment speech must comport with the Establishment Clause.”).

<sup>69</sup> See Norton, *The Government’s Lies*, *supra* note 23, at 92–97 (arguing that lies about voting might violate due process, and lies about abortion might violate substantive due process).

<sup>70</sup> *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2245 (2015).

<sup>71</sup> *Pleasant Grove City*, 555 U.S. at 468–69 (citations omitted).

## A. Government Propaganda Defined

### 1. Propaganda as Self-Serving Manipulation

As noted in the Introduction, there is no single definition of propaganda. This Article uses one that is narrow and negative. One of propaganda's key characteristics is that the speaker mobilizes it for their own benefit, rather than for the audience's, so that its goal is inherently negative.<sup>72</sup> "[P]ropaganda, unlike persuasion, seeks only the satisfaction of the propagandist."<sup>73</sup> Another central characteristic is its manipulateness,<sup>74</sup> making its means negative as well. By manipulative, I mean intentionally undermining reasoned analysis.<sup>75</sup>

One way propaganda may derail deliberation is by arousing strong emotions.<sup>76</sup> The argument is not that emotional persuasion in itself equates to propaganda; emotion is not necessarily the opposite of reason.<sup>77</sup> "Propaganda is not simply closing off rational debate by appeal to emotion; often, emotions are rational and track reasons."<sup>78</sup> Rather, the argument is that propaganda manipulates because it invokes unreasonable emotions that stem from deeply held but completely inaccurate beliefs, such as racist beliefs (conscious and unconscious) about the character of nonwhite or noncitizen Americans.<sup>79</sup> Indeed, some of the most notorious propaganda, such as the anti-Semitic propaganda of the Nazi regime, intentionally drew on pre-existing prejudices.<sup>80</sup>

<sup>72</sup> See Bennett & O'Rourke, *supra* note 5, at 65–69.

<sup>73</sup> *Id.* at 63.

<sup>74</sup> See *supra* note 4; see also Bennett & O'Rourke, *supra* note 5, at 63 (defining propaganda as "the deliberate and systematic attempt to shape perceptions, manipulate cognitions, and direct behavior to achieve a response that furthers the desired intent of the propagandist").

<sup>75</sup> See Bennett & O'Rourke, *supra* note 5, at 64 ("[P]ropagandists use techniques that are either 'anti-reason' or 'pseudo-reason' to effect action[.]").

<sup>76</sup> ERIN STEUTER & DEBORAH WILLS, AT WAR WITH METAPHOR: MEDIA, PROPAGANDA, AND RACISM IN THE WAR ON TERROR 18 (2008) ("Propaganda is not concerned with disseminating information but with rallying emotion."); see also CHRISTOPHER PAUL & MIRIAM MATTHEWS, RAND CORP., THE RUSSIAN "FIREHOSE OF FALSEHOOD" PROPAGANDA MODEL 6 (2016), <https://www.rand.org/pubs/perspectives/PE198.html> [<https://perma.cc/T66Q-DU2M>] (noting that propaganda that arouses emotion "can be particularly persuasive").

<sup>77</sup> Caroline Mala Corbin, *Compelled Disclosures*, 65 ALA. L. REV. 1277, 1306 (2014) [hereinafter Corbin, *Disclosures*] ("As with many binaries, the reason/emotion binary represents a false dichotomy. In reality, emotion and reason are linked in our decision making[.]") (footnotes omitted).

<sup>78</sup> STANLEY, *supra* note 3, at 48.

<sup>79</sup> See Caroline Mala Corbin, Essay, *Terrorists Are Always Muslim but Never White: At the Intersection of Critical Race Theory and Propaganda*, 86 FORDHAM L. REV. 455, 474 (2017) [hereinafter Corbin, *Terrorists*].

<sup>80</sup> Nicholas O'Shaughnessy, *How Hitler Conquered Germany*, SLATE (Mar. 14, 2017), <https://slate.com/news-and-politics/2017/03/how-nazi-propaganda-encouraged-the->

Hitler described it as appealing to people's inner "Schweinhund," or pig-dog.<sup>81</sup> The goal was to create an enemy (Jews), and then to unify Germans against this dehumanized and demonized other.<sup>82</sup>

While relying on stereotypes clearly propagates falsehoods, propaganda is not necessarily false.<sup>83</sup> For example, "whataboutism" is an established propaganda technique that does not depend on lies.<sup>84</sup> In response to an accusation, the purveyor of "whataboutism" deflects by arguing that someone else (such as the accuser) has also done something wrong.<sup>85</sup> Whether the accusation holds up is irrelevant, "[r]elentless whataboutism is a way to justify and distract, not to make a genuine case."<sup>86</sup>

Another manipulative technique is to take advantage of inevitable cognitive errors.<sup>87</sup> We all rely on certain cognitive heuristics, or rules of thumb, to help process the overwhelming amount of information we confront.<sup>88</sup> While these

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masses-to-co-produce-a-false-reality.html [https://perma.cc/35RN-4VN8] [hereinafter O'Shaughnessy, *Hitler*] ("For Goebbels, the role of the propagandist was to express in words what his audience felt in their hearts.").

<sup>81</sup> *Id.*; see also ADOLF HITLER, MEIN KAMPF 180 (Ralph Manheim trans., Houghton Mifflin 1943) (1925) ("The art of propaganda lies in understanding the emotional ideas of the great masses and finding, through a psychologically correct form, the way to the attention and thence to the heart of the broad masses.").

<sup>82</sup> See O'Shaughnessy, *Hitler*, *supra* note 80; cf. Robert Bejesky, *Cognitive Foreign Policy: Linking Al-Qaeda and Iraq*, 56 HOW. L.J. 1, 34 (2012) ("The process begins with creating stereotyped conceptions of the other, dehumanized perceptions of the other . . . the other as a fundamental threat to our cherished values and beliefs. With public fear notched up and the enemy threat imminent, reasonable people act irrationally, independent people act in mindless conformity, and peaceful people act as warriors.") (quoting PHILIP ZIMBARDO, THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL 11 (2007)).

<sup>83</sup> STANLEY, *supra* note 3, at 41–43. Notably, advertisements, which are arguably propaganda of a kind, are barred from lying about their products. See *infra* notes 128–29.

<sup>84</sup> See, e.g., Danielle Kurtzleben, *Trump Embraces One of Russia's Favorite Propaganda Tactics—Whataboutism*, NPR (Mar. 17, 2017), <http://www.npr.org/2017/03/17/520435073/trump-embraces-one-of-russias-favorite-propaganda-tactics-whataboutism> [https://perma.cc/2RNV-7PUM] ("President Trump has developed a consistent tactic when he's criticized: say that someone else is worse.").

<sup>85</sup> *Id.* ("The idea behind whataboutism is simple: Party A accuses Party B of doing something bad. Party B responds by changing the subject and pointing out one of Party A's faults—'Yeah? Well what about that bad thing you did?' (Hence the name.)").

<sup>86</sup> Joshua Geltzer & Jake Sullivan, *Trump Goes Full Putin—Capitulation Inside the Oval Office*, JUST SECURITY (Sept. 30, 2019), <https://www.justsecurity.org/66370/trump-goes-full-putin-capitulation-inside-the-oval-office/> [https://perma.cc/PTB9-4THE].

<sup>87</sup> Cf. Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 637 (1999) ("This is what we mean by manipulation—the utilization of cognitive biases to influence peoples' perceptions and, in turn, behavior.").

<sup>88</sup> Corbin, *Disclosures*, *supra* note 77, at 1295–96 (explaining that "[m]ost researchers today subscribe to a dual-process model of decision making comprised of (1) 'intentional, conscious, explicit thought' and (2) 'unintentional, nonconscious, 'implicit' thought.' The first, deliberative cognitive process focuses on the message's content and argument and often

cognitive shortcuts are often accurate, they do lead to predictable errors.<sup>89</sup> Advertisers, who arguably are propagandizing their products, are masters of exploiting cognitive errors.<sup>90</sup> For example, advertisers take advantage of people's tendency to defer to experts by hiring them to hawk their goods.<sup>91</sup> Another example is the use of repetition, which is a particularly effective means of exploiting cognitive errors.<sup>92</sup> As discussed in more detail below,<sup>93</sup> "[r]epetition makes things seem more plausible,"<sup>94</sup> which explains why it is so popular in propaganda (and advertising).<sup>95</sup> Yet, because these techniques of short-circuiting reasoned analysis are more subtle, some might designate them persuasive rather than propagandistic.

No such uncertainty surrounds deliberate lies. Intentionally misrepresenting the facts that support an argument is the very epitome of manipulating someone's reasoning,<sup>96</sup> even without any accompanying emotional manipulations. Whatever debate there is about what counts as propaganda, there

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requires the expenditure of significant time and energy... [whereas the second] relies on heuristics—rules of thumb—and 'more accessible information such as the source's identity or other non-content cues.'" (footnotes omitted); *see also* Anna Spain Bradley, *The Disruptive Neuroscience of Judicial Choice*, 9 U.C. IRVINE L. REV. 1, 14 (2018) ("Another set of deviations from rationality are conceptualized as heuristics, which are cognitive strategies or mental shortcuts we use in the face of complex or incomplete information to make decision-making easier.").

<sup>89</sup> *See, e.g.*, Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 973–74 (2006) ("[H]euristics . . . are mental shortcuts or rules of thumb that function well in many settings but lead to systematic errors in others.").

<sup>90</sup> *See, e.g.*, Corbin, *Terrorists*, *supra* note 79, at 474 ("With affective priming, for example, advertisers link their product with something audiences already like . . . creating a positive association for their own products. Repeated exposure then cements the association. These techniques lead viewers to draw conclusions about the product that they would not have drawn with more thorough deliberation.") (footnotes omitted).

<sup>91</sup> *Cf.* Peter Lee, *Patent Law and the Two Cultures*, 120 YALE L.J. 2, 24 (2010) ("Rather than wrestle with understanding a complex technology, many people simply seek out expert opinions. Epistemologists suggest that deference to expertise is a rational means for the nonexpert to obtain technical 'knowledge' [.]").

<sup>92</sup> *See infra* note 95. *See generally* Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051, 1084–1102 (2000) (listing more examples of common heuristics).

<sup>93</sup> *See infra* notes 307–11 and accompanying text.

<sup>94</sup> Emily Dreyfuss, *Want to Make a Lie Seem True? Say It Again. And Again. And Again*, WIRED (Feb. 11, 2017), <https://www.wired.com/2017/02/dont-believe-lies-just-people-repeat/> [<https://perma.cc/G9WA-C4PY>] (quoting psychologist Lynn Hasher).

<sup>95</sup> *See, e.g.*, HITLER, *supra* note 81, at 180–81 ("[A]ll effective propaganda must be limited to a very few points and must harp on these in slogans until the last member of the public understands what you want him to understand by your slogan.").

<sup>96</sup> David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 355 (1991) ("Lying forces the victim to pursue the speaker's objectives instead of the victim's own objectives. If the capacity to decide upon a plan of life and to determine one's own objectives is integral to human nature, lies that are designed to manipulate people are a uniquely severe offense against human autonomy.").

is consensus that it includes patent lies and the manufacturing of a preferred version of reality.<sup>97</sup> It is this aspect of propaganda that I will focus on, in part because it is the most readily addressed by legal doctrine.

## 2. *Government Propaganda Doctrinally*

The heart of my argument is that because government propaganda undermines core goals of the Free Speech Clause, most notably the promotion of democratic self-governance, the Free Speech Clause should not just reach government propaganda, but in certain cases ban it. Because effecting this requires fundamentally changing First Amendment law, I define propaganda in a way that can easily translate into free speech doctrine.

To that end, my working definition of government propaganda is government speech that meets four criteria: The statement must (a) be said by the government; (b) assert a verifiably false or misleading statement of fact; (c) concern a matter of public interest; and (d) be made with actual malice. Free speech jurisprudence already makes use of each of these requirements, albeit not all at the same time.

Of the many manipulations that propaganda engages in, this definition of government propaganda focuses on falsehoods. Thus, this particular definition does not require difficult and novel determinations of what amounts to self-interest, or evocation of problematic emotions, or manipulation of cognitive errors. Instead, to ensure workability, the defining characteristic is verifiable falsity and the test for identifying government propaganda draws from current free speech doctrine. Relying exclusively on pre-existing doctrine ensures that courts trying to distinguish between constitutional government speech and unconstitutional government propaganda need not engage in line-drawing beyond their institutional competence. The following subsections elaborate on each requirement.

### a. *Government Speech*

The first requirement limits unconstitutional propaganda to statements made by the government, and the government alone. Under current doctrine, it simply means that the court would rule that the speaker was governmental rather than private. In practice, government propaganda would likely be a subset of government speech, and would include official government proclamations, such as a White House press release or a congressional report.<sup>98</sup> It would also include

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<sup>97</sup>Bryan Schatz, *The Kremlin Would Be Proud of Trump's Propaganda Playbook*, MOTHER JONES (Nov. 21, 2016), <http://www.motherjones.com/politics/2016/11/trump-russia-kremlin-propaganda-tactics/> [<https://perma.cc/K2SP-5DDF>] (describing a classic propaganda technique as “[i]f you don’t like the facts, invent your own”).

<sup>98</sup>Helen Norton, *Government Speech and the War on Terror*, 86 FORDHAM L. REV. 543, 545 (2017) (describing government speech to include “speech by a government body itself (e.g., reports issued by an executive agency or a legislative committee)”).

speech by government officials who have authority to speak for the government.<sup>99</sup>

While the Supreme Court is still demarcating the precise contours of government speech,<sup>100</sup> and there will no doubt be difficult cases where the speech is not obviously private or governmental, application will be more straightforward when government officials are addressing the public in their official capacity on matters pertaining to their official responsibilities. Under *Garcetti*, speech by public employees that is pursuant to their official duties—that is, speech that “owes its existence to a public employee’s professional responsibilities,”<sup>101</sup>—is government speech.<sup>102</sup> Moreover, under the *Summum-Walker* factors, such communications are clearly vehicles for government messages controlled by the government speaker and attributed to the government speaker.<sup>103</sup>

In other words, when the President makes policy announcements via Twitter or addresses the nation during the State of the Union, or an agency head makes a statement during a press conference, or the Administration makes claims about public policy issues such as voter fraud or immigration, such speech falls squarely into the government speech category.

#### b. *False or Misleading Statement of Fact*

Second, the statement must be a verifiably false or misleading statement of fact.<sup>104</sup> This requirement encompasses two characteristics. One, the statement asserts a factual claim. Two, it is possible to objectively establish the falsity of that factual claim.

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<sup>99</sup> *Id.* (describing government speech to include “speech by a government official empowered to speak for a government body (e.g., the president, the secretary of homeland security, a governor, or a police chief)”).

<sup>100</sup> R. George Wright, *Managing the Distinction Between Government Speech and Private Party Speech*, 34 QUINNIPIAC L. REV. 347, 348 (2016) (“The importance of the government speech versus private party speech distinction has not, however, been matched by its clarity.”).

<sup>101</sup> *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006). Note that not all speech by government employees is government speech. An agency head chatting with her spouse during the day, even if from work about her workplace, is unlikely to be “pursuant to [her] official duties.” *Cf. id.*

<sup>102</sup> The Supreme Court has held that “[t]he proper inquiry is a practical one.” *Id.* at 424. Lower courts have considered a range of factors, such as where the speech occurred and whether the speech was part and parcel of an employee’s work duties. *See, e.g., Decotiis v. Whittemore*, 635 F.3d 22, 32 (1st Cir. 2011) (listing factors).

<sup>103</sup> *See supra* note 50 and accompanying text.

<sup>104</sup> *Cf. Rodney A. Smolla, The Puffery of Lawyers*, 36 U. RICH. L. REV. 1, 2 n.2 (2002) (“The touchstone most often employed to determine whether a statement is a ‘fact’ or an ‘opinion’ is whether the statement is susceptible to objective proof or disproof.”).



The key is the ability to objectively validate whether the statement is true or not. This requires a statement of fact.<sup>105</sup> Opinions alone are generally not verifiable, and therefore fall outside this definition of propaganda.<sup>106</sup> Also falling outside might be puffery,<sup>107</sup> hyperbole, satire, and parody.<sup>108</sup> So, for example, claiming to be the best President ever is simultaneously puffery and an opinion.<sup>109</sup> Claiming to have opened a new Apple manufacturing plant in Texas<sup>110</sup> is a statement of fact.<sup>111</sup>

Moreover, for false statements of fact to amount to propaganda, they must be facts that can be easily verified. “A statement is verifiable if it is ‘capable of being objectively characterized as true or false.’”<sup>112</sup> For example, the factual claim that Obama was born in Kenya rather than Hawaii is a statement of fact

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<sup>105</sup> Cf. *id.* at 2 (“A statement that is not reasonably understood by recipients of the communication as a statement of fact is simply not actionable.”).

<sup>106</sup> Opinions that “imply an assertion of objective fact” would satisfy this requirement. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18–19 (1990). The President saying, “In my opinion, Obama was not born in the United States,” still includes the false assertion that Obama was not born in the United States. *See id.* (using a slightly different example). In other words, adding “in my opinion” to a statement of fact does not transform an otherwise actionable statement of fact into a protected opinion. *See* Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 924 (2000) (“For the Supreme Court, the operative distinction was not that drawn by the lower courts between fact and opinion; instead, the operative distinction was between statements that imply an assertion of objective facts and those that do not.”); cf. *Milkovich*, 497 U.S. at 19 (“[It] would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words ‘I think.’”).

<sup>107</sup> Puffery comprises statements like “the best coffee in the world” that people do not or should not take seriously because they are so vague or exaggerated. Roger Colaizzi, Chris Crook, Claire Wheeler, & Taylor Sachs, *The Best Explanation and Update on Puffery You Will Ever Read*, 31 ANTITRUST 86, 86–87 (2017) (“The U.S. Court of Appeals for the Third Circuit, for instance, defines puffery as marketing ‘that is not deceptive, for no one would rely on its exaggerated claims.’ The Ninth Circuit, on the other hand, describes puffery as ‘exaggerated advertising, blustering and boasting upon which no reasonable buyer would rely.’”) (footnote omitted).

<sup>108</sup> Cf. Lidsky, *supra* note 106, at 926 (describing case law “protecting rhetorical hyperbole, satire, and parody”).

<sup>109</sup> *See Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318, 1325 (2015) (“An opinion is ‘a belief[,] a view,’ or a ‘sentiment which the mind forms of persons or things.’”).

<sup>110</sup> Cf. Madlin Mekelburg, *Did Trump Open a ‘Major Apple Manufacturing Plant’ in Austin? No.*, POLITIFACT (Nov. 21, 2019), <https://www.politifact.com/texas/statements/2019/nov/21/donald-trump/did-trump-open-apple-plant-austin-no/> [<https://perma.cc/XM84-28U9>] (rating statement as false).

<sup>111</sup> *See Omnicare*, 135 S. Ct. at 1325 (“A fact is ‘a thing done or existing’ or ‘[a]n actual happening.’”).

<sup>112</sup> Lidsky, *supra* note 106, at 922 n.351 (quoting *Ollman v. Evans*, 750 F.2d 970, 979 (D.C. Cir. 1984) (en banc)).

that can (and has) been easily checked and disproved by objective standards of proof.<sup>113</sup>

Some might protest that it seems like all facts are up for dispute. But, of course, that is not the case: It is really not debatable whether Obama was born in Hawaii.<sup>114</sup> Which is not to say that some facts aren't more contested than others, a state of affairs acknowledged by a taxonomy created by Jane Bambauer.<sup>115</sup> According to Bambauer, factual claims fall into one of three categories: accepted knowledge, contested knowledge, and anti-knowledge.<sup>116</sup> In contrast to contested knowledge, where some debate may remain,<sup>117</sup> accepted knowledge "is comprised of factual propositions that are believed to be correct based on some epistemological standard."<sup>118</sup> That is, accepted knowledge is "supported by enough observations and credible evidence to clear the high bar established by the relevant experts and standard-bearers."<sup>119</sup> The type of falsehoods that would amount to propaganda would be anti-knowledge: factual claims that fly in the face of accepted knowledge<sup>120</sup>—such as claims that Obama was born in Kenya rather than the United States.

Courts are experienced in ferreting out false or misleading statements of fact, as many areas of law require distinguishing fact from opinion, and truth from falsity. First Amendment doctrine itself has long drawn these lines. For example, in defamation, the "opinion privilege"<sup>121</sup> protects from liability statements of opinion rather than fact.<sup>122</sup> And because truth is a defense to defamation, defamation law also requires separating truth from falsehoods.<sup>123</sup>

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<sup>113</sup> *Barack Obama Releases Birth Certificate*, BBC NEWS (Apr. 27, 2011), <https://www.bbc.com/news/av/world-us-canada-13213810/barack-obama-releases-birth-certificate> [<https://perma.cc/R5CL-DEG6>] (noting that Hawaii officials confirmed that released birth certificate was authentic).

<sup>114</sup> *Id.* I reject any relativist claims that it is impossible to distinguish between true and false. It is simply false that I am six feet tall.

<sup>115</sup> Bambauer, *supra* note 1, at 85–87.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 86 (describing contested knowledge as that "wide terrain of claims that may have some evidence in support, and perhaps some evidence in conflict, but not enough of either sort to conclusively place the statement into the accepted knowledge or anti-knowledge buckets").

<sup>118</sup> *Id.* at 85.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* Alternatively, such propaganda could be termed "patently false," which David Han would define as "easily and objectively provable as false under whatever practical standard a reasonable person can demand." Han, *Conspiracy Theories*, *supra* note 1, at 182.

<sup>121</sup> Lidsky, *supra* note 106, at 919 (discussing the opinion privilege); *cf.* Bambauer, *supra* note 1, at 84 ("First, free speech law already makes a distinction between factual and non-factual statements.").

<sup>122</sup> *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990) (explaining that free speech doctrine "provides protection for statements that cannot 'reasonably [be] interpreted as stating actual facts'").

<sup>123</sup> *Cf.* Bambauer, *supra* note 1, at 87 ("Free speech doctrine has long permitted courts and other regulators . . . to determine the truth and falsity of a speaker's statements.").

Thus, defamation law provides a well-plowed field of jurisprudence for identifying false statements of fact.

The verifiably “false or misleading statement of fact” is also a well-established threshold question in commercial speech.<sup>124</sup> In ruling that the Free Speech Clause covered commercial speech,<sup>125</sup> the Supreme Court made clear that protection did not reach false, deceptive, or misleading commercial speech:<sup>126</sup> “The First Amendment . . . does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely.”<sup>127</sup>

A false or misleading statement of fact appears as an element in other free speech questions, including intentional infliction of emotional distress,<sup>128</sup> and common law fraud and perjury.<sup>129</sup> Statutes, too, depend on it.<sup>130</sup> In other words, the courts have well-established doctrine for ascertaining verifiably false and misleading statements of fact.<sup>131</sup>

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<sup>124</sup> In fact, the first step in the four-part analysis of commercial speech has long been to determine whether the speech is false or misleading. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980).

<sup>125</sup> The standard definition of commercial speech is “speech that does no more than propose a commercial transaction,” and the paradigmatic example is an advertisement. *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001).

<sup>126</sup> *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 638 (1985) (“The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading[.]”).

<sup>127</sup> *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771–72 (1976).

<sup>128</sup> If the intentional infliction of emotional distress is inflicted by speech alone, and the speech involved a matter of public concern, then the Free Speech Clause protects it unless it contains a false or misleading statement of fact made with actual malice. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988); *see also Snyder v. Phelps*, 562 U.S. 443, 451 (2011).

<sup>129</sup> *United States v. Alvarez*, 567 U.S. 709, 747 (2012) (Alito, J., dissenting) (“Laws prohibiting fraud, perjury, and defamation, for example, were in existence when the First Amendment was adopted, and their constitutionality is now beyond question.”).

<sup>130</sup> The Lanham Act prohibits false and misleading advertizing, 15 U.S.C. § 1051(a)(3) (2012). It is illegal to misrepresent material facts connected with the sale or purchase of securities. 15 U.S.C. § 78j(b) (2012). It is also illegal to make false or fraudulent statements to a federal official, 18 U.S.C. § 1001(a) (2012), or to make false claims about being a federal official, 18 U.S.C. § 912 (2012).

<sup>131</sup> The scope could be altered in either direction. It could be expanded from false or misleading statements to include misleading *omissions*, which would capture more harmful propaganda and thereby help compensate for leaving out, for example, emotionally manipulative propaganda that lacks an assertion of fact. Or it could be contracted to false (as opposed to false or misleading) statements of fact to help curtail potential vagueness issues. I’ve proposed the middle but understand both the arguments for expanding and for contracting. As discussed below, much of the propaganda discussed in the Article is patently false rather than misleading, and so easily satisfies this requirement.

c. *Matter of Public Concern*

Third, the false factual statement must be on a matter of public concern, which the Supreme Court defines as speech of “general interest and of value and concern to the public.”<sup>132</sup> That is, “[s]peech deals with matters of public concern when it can ‘be fairly considered as relating to any matter of political, social, or other concern to the community,’ or when it ‘is a subject of legitimate news interest.’”<sup>133</sup> Most mainstream press coverage is on a matter of public concern, including, for example, whether Obama has met the constitutional requirements to be president, the extent of voter fraud, and the details of the Trump Administration’s immigration policies.

As with the other tests, the Supreme Court has made it an essential inquiry in several areas of free speech law, including defamation,<sup>134</sup> outrageous speech that intentionally inflicts emotional distress,<sup>135</sup> publication of private<sup>136</sup> or illegally obtained information,<sup>137</sup> and speech by public employees.<sup>138</sup> Again, even if the line is not sharp, there is plenty of precedent on this question.

d. *Actual Malice*

The fourth factor in my proposed definition of propaganda is that the statement must be made with “actual malice.” Actual malice is a term of art that does not mean ill will or spite.<sup>139</sup> Rather, it means that the speaker must have intended to lie or acted with reckless disregard as to whether their statement was

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<sup>132</sup> *Snyder*, 562 U.S. at 453.

<sup>133</sup> *Id.* (citation omitted).

<sup>134</sup> *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 768–69 (1986) (“[W]here a newspaper publishes speech of public concern, a private-figure plaintiff cannot recover damages without also showing that the statements at issue are false.”).

<sup>135</sup> *Snyder*, 562 U.S. at 458–59 (holding that the Free Speech Clause precludes liability for intentional infliction of emotional distress, even if inflicted on a private individual, if speech is on a matter of public concern).

<sup>136</sup> *Fla. Star v. B.J.F.*, 491 U.S. 524, 536 (1989) (in deciding whether the Free Speech Clause shielded newspaper from liability for publishing private information, the Court emphasized that “[t]he first inquiry is whether the newspaper ‘lawfully obtain[ed] truthful information about a matter of public significance’”).

<sup>137</sup> *Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001) (ruling that “a stranger’s illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern” when faced with media that published information that a third-party had illegally obtained).

<sup>138</sup> *City of San Diego v. Roe*, 543 U.S. 77, 83 (2004) (per curiam) (“[A] public employee’s speech is entitled to [First Amendment protection] only when the employee speaks ‘as a citizen upon matters of public concern’ rather than ‘as an employee upon matters only of personal interest.’”).

<sup>139</sup> *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510 (1991) (“Actual malice under the *New York Times* standard should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will.”).

true or not.<sup>140</sup> The Supreme Court has explained reckless disregard as “entertain[ing] serious doubts as to the truth of [the] publication”<sup>141</sup> or “purposeful avoidance of the truth.”<sup>142</sup>

As with the other factors, there is well-developed case law on actual malice. It has been a mainstay in defamation suits since the Supreme Court decided *New York Times Co. v. Sullivan* over a half a century ago.<sup>143</sup> It also appears as a requirement in certain false light invasion of privacy claims<sup>144</sup> and intentional infliction of emotional distress claims,<sup>145</sup> as well as regulations of campaign lies.<sup>146</sup>

Because the proposed definition of unconstitutional government propaganda relies on tests already existing in Free Speech Clause doctrine, it can be readily implemented. In many ways it tracks free speech doctrine regarding defamation of a public figure, where false statements of fact on a

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<sup>140</sup> *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964) (defining actual malice as “with knowledge that it was false or with reckless disregard of whether it was false or not”).

<sup>141</sup> *Masson*, 501 U.S. at 510 (“[T]he plaintiff must demonstrate that the author ‘in fact entertained serious doubts as to the truth of his publication[.]’”) (citation omitted); *see also* *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964) (“[O]nly those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions.”).

<sup>142</sup> *Harte-Hanks Commc’ns, Inc. v. Connaughton*, 491 U.S. 657, 692 (1989) (“Although failure to investigate will not alone support a finding of actual malice, the purposeful avoidance of the truth is in a different category.”) (citation omitted); *see also id.* at 692 (“[T]he newspaper’s inaction”—such as failing to listen to available tapes and interview a known key witness—“was a product of a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity” and amounted to actual malice).

<sup>143</sup> *N.Y. Times*, 376 U.S. at 279–80 (establishing rule that a public official cannot “recover[] damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’”).

<sup>144</sup> *Time, Inc. v. Hill*, 385 U.S. 374, 378, 387–88 (1967) (involving a Time Magazine news story that misrepresented a family’s experience as hostages); *see also* Nat Stern, *The Force of A Legal Concept: The Steady Extension of the Actual Malice Standard*, 12 FIRST AMEND. L. REV. 449, 456 (2014) [hereinafter Stern, *The Force*] (“[T]he Court ruled that recovery of damages for ‘false reports of matters of public interest’ required proof that the defendant published the report with actual malice.”).

<sup>145</sup> *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 48, 56 (1988) (involving Hustler Magazine’s parody ad of televangelist Jerry Falwell); *see also* Stern, *The Force*, *supra* note 144, at 456 (“[T]he Court ruled that a public figure like Falwell could recover for IIED in such circumstances only by demonstrating that the defendant had made a false statement of fact about that figure with actual malice.”) (footnote omitted).

<sup>146</sup> Lee Goldman, *False Campaign Advertising and the “Actual Malice” Standard*, 82 TUL. L. REV. 889, 902 (2008) (“The Court, in *Brown v. Hartlage*, apparently imported the actual malice standard to state regulation of false campaign advertising.”). While the Court’s adoption was not explicit, lower courts have uniformly struck down state laws banning false campaign speech unless they included an actual malice requirement. *Id.* at 904; *see also id.* at 904 nn.115–16 (listing cases and statutes). Some have even struck down regulations with an actual malice requirement. Ashley Messenger, *False Statements and Actual Malice: Courts Rethink What’s Required to Protect Free Speech*, 31 COMM. LAW., Summer 2015, at 6, 7–8 (listing cases).

matter of public interest are protected by the Free Speech Clause unless made with actual malice.<sup>147</sup> Whatever problems the requirements pose, they are problems courts have long dealt with. Given all the other line-drawing that courts regularly perform when adjudicating constitutional questions, these fall well within their institutional competence.

Before delving into the propaganda we confront today, I want to address the argument that many government lies may not be made with actual malice, at least when Trump is the source. Although Trump spouts untruths with abandon, the argument goes, it is not because he knows that his words are untrue, but because he simply does not care.<sup>148</sup> Philosopher and author of *On Bullshit*, Harry Frankfurt, distinguishes between the liar (one who “asserts something which he himself believes to be false”) and the bullshitter (one who “is indifferent to whether what he says is true or false”), and puts Trump in the latter category.<sup>149</sup>

However, indifference does not preclude knowledge. The President is no doubt aware of the nonstop corrections to his often-repeated falsehoods;<sup>150</sup> nevertheless, Trump “keeps going long after the facts are clear, in what appears to be a deliberate effort to replace the truth with his own, far more favorable, version of it. He is not merely making gaffes or misstating things, he is purposely injecting false information into the national conversation.”<sup>151</sup> Moreover, the sheer scale of Trump’s lying makes questionable the claim that the truth eludes him.<sup>152</sup> For example, Trump must know that the details of made-up conversations are not true.<sup>153</sup>

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<sup>147</sup> See *N.Y. Times*, 376 U.S. at 279–80. Of course, with government propaganda, the government is making a false statement of fact rather than a private speaker.

<sup>148</sup> Harry G. Frankfurt, *Donald Trump Is BS, Says Expert in BS*, TIME (May 12, 2016), <http://time.com/4321036/donald-trump-bs/> [<https://perma.cc/4G7T-WBC9>] (“What is somewhat more difficult to establish is whether [Trump’s] unmistakably dubious statements are deliberate lies or whether they are just bullshit.”).

<sup>149</sup> *Id.*; see also Matthew Yglesias, *The Bullshitter-In-Chief*, VOX (May 30, 2017), <https://www.vox.com/policy-and-politics/2017/5/30/15631710/trump-bullshit> (on file with the *Ohio State Law Journal*) (“Trump is often completely indifferent to accuracy.”).

<sup>150</sup> Greg Sargent, *Trump’s Lies and Disinformation Require a New Kind of Media Response*, WASH. POST (Dec. 10, 2018), [https://www.washingtonpost.com/opinions/2018/12/10/trumps-lies-disinformation-require-new-kind-media-response/?utm\\_term=.87045dd795f6](https://www.washingtonpost.com/opinions/2018/12/10/trumps-lies-disinformation-require-new-kind-media-response/?utm_term=.87045dd795f6) [<https://perma.cc/4ALM-AW62>] (“[I]f Trump repeats a falsehood over and over after it has been debunked, it is obviously deliberate deception.”).

<sup>151</sup> Glenn Kessler, *Meet the Bottomless Pinocchio, a New Rating for a False Claim Repeated Over and Over Again*, WASH. POST (Dec. 10, 2018), [https://www.washingtonpost.com/politics/2018/12/10/meet-bottomless-pinocchio-new-rating-false-claim-repeated-over-over-again/?utm\\_term=.c0f238dd8485](https://www.washingtonpost.com/politics/2018/12/10/meet-bottomless-pinocchio-new-rating-false-claim-repeated-over-over-again/?utm_term=.c0f238dd8485) [<https://perma.cc/AS9Q-3VEH>] [hereinafter Kessler, *Bottomless*].

<sup>152</sup> Susan B. Glasser, *It’s True: Trump Is Lying More, and He’s Doing It on Purpose*, NEW YORKER (Aug. 3, 2018), <https://www.newyorker.com/news/letter-from-trumps-washington/trumps-escalating-war-on-the-truth-is-on-purpose> [<https://perma.cc/833N-XQVU>] (“The White House assault on the truth is not an accident—it is intentional.”).

<sup>153</sup> After Trump claimed that previous Presidents told him they agreed with his desire to build a wall on our Southern border, Bush, Clinton, Obama, and Carter all quickly made

In any event, actual malice does not require knowledge of falsity; recklessness suffices.<sup>154</sup> That is, making statements with a reckless or willful disregard for the truth amounts to actual malice.<sup>155</sup> Although willful disregard demands more than negligence,<sup>156</sup> a President fabricating claims—a practice documented by journalists and acknowledged by Trump<sup>157</sup>—goes well beyond negligence. Instead, these fabrications bear the hallmark of reckless disregard for truth or falsity.<sup>158</sup> As the Supreme Court noted, to avoid recklessness, a statement must be made in good faith,<sup>159</sup> and “[p]rofessions of good faith” are likely unpersuasive “where a story is fabricated by the defendant, [or] is the product of his imagination, . . . [or] when the [speaker’s] allegations are so inherently improbable that only a reckless man would have put them in circulation.”<sup>160</sup> Indeed, as explored in the next section, Trump seems to embody reckless disregard for the truth.

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clear that they had not spoken to Trump about the wall. Peter Baker, *Trump Says Predecessors Confessed Support for the Border Wall. Not True, They Say*, N.Y. TIMES (Jan. 7, 2019), <https://www.nytimes.com/2019/01/07/us/politics/trump-carter-presidents-border-wall.html> [<https://perma.cc/5PWK-LXEN>]. Trump has also made up conversations with the President of Mexico and the President of the Boy Scouts. *Id.*

<sup>154</sup> *Harte-Hanks Commc’ns, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989).

<sup>155</sup> *Id.* at 667 (“Actual malice, instead, requires at a minimum that the statements were made with a reckless disregard for the truth.”).

<sup>156</sup> *Id.* at 688–92 (explaining that “reckless disregard” is not failing to meet professional standards of investigation but deliberately ignoring available evidence in an attempt to avoid the truth).

<sup>157</sup> David Smith, *Donald Trump Admits Making Up ‘Facts’ in Trade Meeting with Justin Trudeau*, GUARDIAN (Mar. 15, 2018), <https://www.theguardian.com/us-news/2018/mar/15/donald-trump-admits-made-up-facts-justin-trudeau> [<https://perma.cc/34CP-NFJN>] (“The US president . . . admitted he told Trudeau that America has a trade deficit with its neighbour [sic] when he ‘had no idea’ if that was true.”).

<sup>158</sup> *Cf.* Lackland H. Bloom, Jr., *Proof of Fault in Media Defamation Litigation*, 38 VAND. L. REV. 247, 278 (1985) (“Obviously, when someone makes a [very specific] statement . . . with no way of knowing whether it is true or false, he is engaging in deliberate fabrication and an inference of actual knowledge of falsity would be warranted. Perhaps because the defendant could believe that his fabricated charges might coincidentally turn out to be true, the courts are content to dispose of such cases as instances of reckless disregard for the truth.”).

<sup>159</sup> *See* *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968) (“The finder of fact must determine whether the publication was indeed made in good faith.”).

<sup>160</sup> *Id.*; *cf.* Jon Allsop, *After 10,000 ‘False or Misleading Claims,’ Are We Any Better at Calling out Trump’s Lies?*, COLUM. JOURNALISM REV. (Apr. 30, 2019), [https://www.cjr.org/the\\_media\\_today/trump\\_fact-check-washington\\_post.php](https://www.cjr.org/the_media_today/trump_fact-check-washington_post.php) [<https://perma.cc/ZSR3-BU3U>] (“Trump routinely says things a president of the United States should know to be false, refuses to correct the record, and then, very often, says them again.”).

## B. Propaganda Today

Although propaganda is hardly a new phenomenon,<sup>161</sup> it has become newly salient in the United States for at least two reasons. First, the rate of government propaganda is at an all-time high, at least in the modern era,<sup>162</sup> so that Americans must contend with endless government-created “alternative facts.”<sup>163</sup> Second, the ease with which government propaganda spreads, and the ability to precisely direct it at receptive audiences, is unmatched.<sup>164</sup> Note that while the propaganda described below often shares several traditional indicia of propaganda, such as being self-serving and appealing to baser emotions, I focus on propaganda conforming to my proposed definition: the government’s false or misleading statements of fact on matters of public interest made with actual malice.

### 1. Unprecedented Propaganda

To his critics, Trump has been dubbed the “Liar-in-Chief” for his pathological inability to tell the truth.<sup>165</sup> “Trump has brought to the White House bully pulpit a disorienting habit of telling lies, big and small, without evident shame.”<sup>166</sup> Article after article has chronicled his repeated falsehoods.<sup>167</sup> Counting only “demonstrably and substantially false statements,” the *New York Times* recorded that Trump told five times more “separate untruths” in his first

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<sup>161</sup> Cf. Waldman, *Marketplace Fake News*, *supra* note 1, at 846 (“Fake news is a new name for an old problem.”).

<sup>162</sup> See *infra* Part III.B.1; see also Konnikova, *supra* note 8.

<sup>163</sup> Cf. Benkler et al., *Study*, *supra* note 9 (describing current media environment as “a propaganda and disinformation-rich environment”).

<sup>164</sup> See *infra* Part III.B.2; see also Nina I. Brown & Jonathan Peters, *Say This, Not That: Government Regulation and Control of Social Media*, 68 SYRACUSE L. REV. 521, 525 (2018) (“Though the publication of blatantly inaccurate and fabricated information is nothing new, social media has enhanced the ability quickly and effortlessly to spread misinformation.”).

<sup>165</sup> See, e.g., John Pavlovitz, *Liar in Chief: Fact-Checking Shows 69% of What Trump Says Is Untrue*, MILWAUKEE INDEP. (Mar. 11, 2018), <http://www.milwaukeeindependent.com/john-pavlovitz/fact-checking-shows-69-of-what-trump-says-is-untrue> [<https://perma.cc/FP3Z-KHQ5>]; Tessa Stuart, *Donald Trump: Liar in Chief*, ROLLING STONE (Apr. 11, 2017), <https://www.rollingstone.com/politics/politics-features/donald-trump-liar-in-chief-115517/> (on file with the *Ohio State Law Journal*). “Gaslighter-in-Chief” is a popular alternative. See, e.g., Frida Ghitis, *Donald Trump Is ‘Gaslighting’ All of Us*, CNN (Jan. 16, 2017), <https://www.cnn.com/2017/01/10/opinions/donald-trump-is-gaslighting-america-ghitis/index.html> [<https://perma.cc/B8VV-6FES>].

<sup>166</sup> Steve Coll, *Donald Trump’s “Fake News” Tactics*, NEW YORKER (Dec. 3, 2017), <https://www.newyorker.com/magazine/2017/12/11/donald-trumps-fake-news-tactics> [<https://perma.cc/5K37-QX9S>].

<sup>167</sup> See, e.g., Scorecard and Fact Check of Donald Trump, POLITIFACT, <https://www.politifact.com/personalities/donald-trump/> [<https://perma.cc/47X4-AD5V>] (reporting that only 4% of Trump’s evaluated statements were deemed true while 70% were false, including 16% pants on fire false; 34% false; and 20% mostly false).



ten months in office than Obama did over his entire eight years.<sup>168</sup> The *Washington Post* catalogued well over 15,000 false or misleading claims to the public between Trump's inauguration and December 2019.<sup>169</sup> Moreover, Trump tends to repeat lies again and again.<sup>170</sup> In response, one fact-checking source created an entirely new standard—the Bottomless Pinocchio—in order to capture this phenomenon.<sup>171</sup> This “dubious distinction” is reserved for “politicians who repeat a false claim so many times that they are, in effect, engaging in campaigns of disinformation.”<sup>172</sup>

Trump's lies are so numerous and varied, they merit a taxonomy. I propose four categories: self-aggrandizing lies; cover-up lies; false attacks on opponents; and policy lies. An entire category cannot be labelled as government propaganda or not, as each individual statement must be analyzed according to the four propaganda factors. This Article tends to highlight the policy falsehoods, but government propaganda from all categories contributes to the disinformation and the destabilization of truth that undermines the democratic processes described in Part IV.

First are Trump's self-aggrandizing lies. These include the false claims that the crowds at his inauguration were the biggest ever,<sup>173</sup> that he holds the “all-time record [for covers] in the history of Time Magazine,”<sup>174</sup> and empty boasts

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<sup>168</sup> David Leonhardt, Ian Prasad Philbrick, & Stuart A. Thompson, *Trump's Lies vs. Obama's*, N.Y. TIMES (Dec. 14, 2017), <https://www.nytimes.com/interactive/2017/12/14/opinion/sunday/trump-lies-obama-who-is-worse.html> [https://perma.cc/7M84-33SV] (Trump told 103 “separate untruths” in ten months compared to Obama's 18 over eight years). The article added, “If we had used a less strict standard, Trump would look even worse by comparison.” *Id.*

<sup>169</sup> Glenn Kessler, Salvador Rizzo, & Meg Kelly, *President Trump Has Made 15,413 False or Misleading Claims over 1,055 Days*, WASH. POST (Dec. 16, 2019), <https://www.washingtonpost.com/politics/2019/12/16/president-trump-has-made-false-or-misleading-claims-over-days/> [https://perma.cc/F8XU-VJYF] [hereinafter Kessler, Rizzo, & Kelly].

<sup>170</sup> See *supra* notes 150–52 and accompanying text.

<sup>171</sup> Kessler, *Bottomless*, *supra* note 151.

<sup>172</sup> *Id.*

<sup>173</sup> Harry Cockburn, *Donald Trump Again Claims to Have Largest Presidential Inauguration Audience in History*, INDEPENDENT (Jan. 26, 2017), <https://www.independent.co.uk/news/world/americas/donald-trump-claims-presidential-inauguration-audience-history-us-president-white-house-barack-a7547141.html> (on file with *Ohio State Law Journal*) (“Despite overwhelming evidence to the contrary, Donald Trump has again claimed he had the largest inauguration crowd in history.”); see also Jon Swaine, *Trump Inauguration Crowd Photos Were Edited After He Intervened*, GUARDIAN (Sept. 6, 2018), <https://www.theguardian.com/world/2018/sep/06/donald-trump-inauguration-crowd-size-photos-edited> (on file with the *Ohio State Law Journal*).

<sup>174</sup> Glenn Kessler, *President Trump's First Seven Days of False Claims, Inaccurate Statements and Exaggerations*, WASH. POST (Jan. 27, 2017), <https://buff.ly/2DKh73R> [https://perma.cc/2R54-QKAG] (noting that Nixon holds the record and Hillary Clinton has at least twice as many covers as Trump).

of that ilk.<sup>175</sup> Some of these fibs may be best characterized as puffery or hyperbole, but others, especially specific claims that are meant to be taken seriously, might well satisfy the requirements.<sup>176</sup>

Second are the cover-up lies, where Trump denies wrongdoing despite evidence to the contrary. The lies range from denying that he mocked a disabled *New York Times* reporter, despite a video showing him mock the reporter;<sup>177</sup> to arguing that the whistleblower complaint about improprieties during a phone call with the President of Ukraine was “total fiction,”<sup>178</sup> despite the rough transcript that Trump himself released confirming many of the whistleblower’s points.<sup>179</sup> The factchecker PolitiFact awarded its “2019 Lie of the Year” to Trump’s repeated assertion that the whistleblower was “almost completely wrong.”<sup>180</sup> The main qualifying issue here is not actual malice—no one is in a

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<sup>175</sup> For example, Trump has claimed, more than once, that “I am the most popular person in the history of the Republican Party. Beating Lincoln. I beat our Honest Abe.” Apart from the fact that polling did not exist at the time of Lincoln, George W. Bush had higher ratings after 9/11. Louis Jacobson, *No, Donald Trump’s Poll Numbers Do Not Beat Lincoln, All Other GOP Presidents*, POLITIFACT (July 30, 2018), <https://www.politifact.com/truth-o-meter/statements/2018/jul/30/donald-trump/has-donald-trump-had-highest-poll-numbers-any-gop/> [<https://perma.cc/66N8-TX6F>].

<sup>176</sup> If specific enough, the claim would be a verifiable statement of fact. For actual malice, who would have better knowledge of the truth or falsity of his own accomplishments than Trump himself? Even if these accomplishments on their own were not a matter of public interest, they may become one when the President of the United States claims them as accomplishments. The one remaining question is whether any Trump boasts are made in Trump’s personal, rather than official, capacity.

<sup>177</sup> *Donald Trump Mocks Disabled Reporter*, POLITICO (Jan. 9, 2017), <https://www.politico.com/video/2017/01/donald-trump-mocks-disabled-reporter-061897> [<https://perma.cc/G2KT-927U>].

<sup>178</sup> Katie Sanders, *Lie of the Year 2019: Donald Trump’s Claim Whistleblower Got Ukraine Call ‘Almost Completely Wrong,’* POLITIFACT (Dec. 16, 2019), <https://www.politifact.com/truth-o-meter/article/2019/dec/16/lie-of-the-year-donald-trump-whistleblower-wrong/> [<https://perma.cc/8ARF-6SH7>]. Trump has repeatedly described the call as “perfect.” *Id.*; see also Kessler, Rizzo, & Kelly, *supra* note 169 (noting that Trump has claimed the whistleblower complaint was inaccurate at least 60 times).

<sup>179</sup> See Glenn Kessler, *Trump’s Very Inaccurate Claim that the Whistleblower Is “Very Inaccurate,”* WASH. POST (Oct. 9, 2019), <https://www.washingtonpost.com/politics/2019/10/09/trumps-very-inaccurate-claim-whistleblower-is-very-inaccurate/> [<https://perma.cc/2R54-QKAG>] (describing how the whistleblower’s claims were confirmed by the released transcript, including the requests to investigate Joe Biden as well as the debunked conspiracy theory about DNC servers in Ukraine); see also Eugene Kiely, Lori Robertson & D’Angelo Gore, *Trump’s Inaccurate Claims About His ‘Perfect’ Call*, FACTCHECK.ORG (Oct. 23, 2019), <https://www.factcheck.org/2019/10/trumps-inaccurate-claims-about-his-perfect-call/> [<https://perma.cc/J5YS-HGU4>] (describing the memo transcript that confirmed the whistleblower’s claims).

<sup>180</sup> Sanders, *supra* note 178.

better position than Trump to know what he has or has not done—but whether the President lied in his personal or official capacity.<sup>181</sup>

Third are the attacks on his opponents, where Trump lies about those who have criticized him.<sup>182</sup> Obama was not born in the United States (he was).<sup>183</sup> Hillary Clinton and her 2008 campaign started the birther controversy (she did not).<sup>184</sup> Vice President Biden forced Ukraine to fire a prosecutor looking into corruption at a company linked to Biden's son (in fact, the United States was trying to oust the prosecutor for failing to investigate corruption).<sup>185</sup> A major target of Trump's ire is the mainstream media.<sup>186</sup> Any press critical of him is "fake news,"<sup>187</sup> a term Trump has applied on Twitter to "the mainstream media," the *New York Times*, the *Washington Post*, the *Wall Street Journal*, CNN, MSNBC, CBS, ABC, NBC, *60 Minutes*, Google, and a long list of individual journalists.<sup>188</sup> Trump has even taken to denouncing the press as the "enemy of the people" despite the phrase's long association with dictators and authoritarian regimes.<sup>189</sup> One analysis of his tweets found that he derided the

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<sup>181</sup> That the President lied is generally a matter of public concern. Also, most of these cover-up lies—taking the form of "I did not do X"—can be verified with proof of X, assuming that the evidence is sufficient to verify that the President did, in fact, commit X.

<sup>182</sup> Cf. Jasmine C. Lee & Kevin Quealy, *The 598 People, Places and Things Donald Trump Has Insulted on Twitter: A Complete List*, N.Y. TIMES (May 24, 2019), <https://www.nytimes.com/interactive/2016/01/28/upshot/donald-trump-twitter-insults.html> [<https://perma.cc/LK44-FWMM>].

<sup>183</sup> See Michael Barbaro, *Donald Trump Clung to 'Birther' Lie for Years, and Still Isn't Apologetic*, N.Y. TIMES (Sept. 16, 2016), <https://www.nytimes.com/2016/09/17/us/politics/donald-trump-obama-birther.html> [<https://perma.cc/8TDE-72NL>].

<sup>184</sup> Maggie Haberman & Alan Rappeport, *Trump Drops False 'Birther' Theory, but Floats a New One: Clinton Started It*, N.Y. TIMES (Sept. 16, 2016), <https://www.nytimes.com/2016/09/17/us/politics/donald-trump-birther-obama.html> [<https://perma.cc/T9RQ-43WB>].

<sup>185</sup> Eugene Kiely & Robert Farley, *Fact: Trump TV Ad Misleads on Biden and Ukraine*, FACTCHECK.ORG (Oct. 9, 2019), <https://www.factcheck.org/2019/10/fact-trump-tv-ad-misleads-on-biden-and-ukraine/> [<https://perma.cc/TD3A-BJSC>]; Amy Sherman, *Donald Trump Ad Misleads About Joe Biden, Ukraine, and the Prosecutor*, POLITIFACT (Oct. 11, 2019), <https://www.politifact.com/truth-o-meter/statements/2019/oct/11/donald-trump/trump-ad-misleads-about-biden-ukraine-and-prosecut/> [<https://perma.cc/Y3J9-LJRZ>] (rating ad as "false").

<sup>186</sup> See, e.g., *Tweeted by Donald Trump: CPJ Database of Tweets on the Press*, GOOGLE SHEETS, [https://docs.google.com/spreadsheets/d/1LcRxPEUyJi3BaIb\\_WD0GDx4tYoHi1LRUaB6ftDtDRc/edit#gid=0](https://docs.google.com/spreadsheets/d/1LcRxPEUyJi3BaIb_WD0GDx4tYoHi1LRUaB6ftDtDRc/edit#gid=0) (on file with the *Ohio State Law Journal*) (database from 6-16-2015 to 1-19-2019).

<sup>187</sup> See Tamara Keith, *President Trump's Description of What's Fake Is Expanding*, NPR (Sept. 2, 2018), <https://www.npr.org/2018/09/02/643761979/president-trumps-description-of-whats-fake-is-expanding> [<https://perma.cc/29MQ-DFSU>] (analyzing Trump's tweets and concluding that "[o]ften when Trump says something is fake, it isn't false. Rather, he just doesn't like it").

<sup>188</sup> See, e.g., Lee & Quealy, *supra* note 182.

<sup>189</sup> See Emma Graham-Harrison, *'Enemy of the People': Trump's Phrase and Its Echoes of Totalitarianism*, GUARDIAN (Aug. 3, 2018), <https://www.theguardian.com/us-news/2018/>

mainstream media more often than any other target.<sup>190</sup> In contrast to specific factual accusations, Trump's more generalized attacks on the press may fall on the opinion rather than fact side of the line. Thus, despite sharing many characteristics of classic propaganda, calling the press "enemy of the people" may not meet my proposed doctrinal definition.

Fourth are the false claims regarding public policy issues. This disinformation goes beyond massaging the facts. Instead, it is highly misleading or just out-and-out wrong.<sup>191</sup> For example, on voter fraud, Trump has repeatedly and publicly advanced unfounded accusations of serious fraud during the 2016 Presidential election in Virginia, New Hampshire, and California<sup>192</sup>—places that helped Hillary Clinton win the popular vote.<sup>193</sup> Moreover, Trump has insisted illegal immigrants cast many of these fraudulent votes.<sup>194</sup> Trump rebooted this theme in the 2018 midterms, with lies such as there are "a lot of people—a lot of people—my opinion, and based on proof—that try and get in illegally and actually vote illegally,"<sup>195</sup> and again in 2019, when he claimed that

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aug/03/trump-enemy-of-the-people-meaning-history [https://perma.cc/WZ59-WLP2] (noting that Stalin, Mao Zedong, and Hitler all used the phrase to denounce their enemies).

<sup>190</sup> Roland Hughes, *Trump's Year on Twitter: Who Has He Criticized and Praised the Most?*, BBC NEWS (Jan. 21, 2018), <https://www.bbc.com/news/world-us-canada-42651688> [https://perma.cc/RNJ4-SUFH]; see also Stephanie Sugars, *From Fake News to Enemy of the People: An Anatomy of Trump's Tweets*, COMMITTEE TO PROTECT JOURNALISTS (Jan. 30, 2019), <https://cpj.org/blog/2019/01/trump-twitter-press-fake-news-enemy-people.php> [https://perma.cc/9ZJ8-WCFP] (finding that over 11% of all Trump's tweets attacked journalists or the news media).

<sup>191</sup> See generally James Pfiffner, *Trump's Lies Corrode Democracy*, BROOKINGS INST.: FIXGOV (Apr. 13, 2018), <https://www.brookings.edu/blog/fixgov/2018/04/13/trumps-lies-corrode-democracy/> [https://perma.cc/6RRJ-EM7N] (listing Trump policy lies on unemployment rate, tax rate, and murder rate, among others).

<sup>192</sup> See, e.g., Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 27, 2016, 7:31 PM), <https://twitter.com/realDonaldTrump/status/803033642545115140> (on file with the *Ohio State Law Journal*) ("Serious voter fraud in Virginia, New Hampshire, and California – so why isn't the media reporting on this? Serious bias – big problem!"); Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 27, 2016, 3:30 PM), <https://twitter.com/realdonaldtrump/status/802972944532209664?lang=en> (on file with the *Ohio State Law Journal*) ("In addition to winning the Electoral College in a landslide, I won the popular vote if you deduct the millions of people who voted illegally.").

<sup>193</sup> See Emily Schultheis & Julia Boccagno, *Trump v. Clinton: What the Popular Vote in Each State Shows*, CBS NEWS (Dec. 19, 2016), <https://www.cbsnews.com/news/trump-v-clinton-what-the-popular-vote-in-each-state-shows-electoral-college/> [https://perma.cc/7FS5-WJJ8].

<sup>194</sup> Maggie Koerth, *The Tangled Story Behind Trump's False Claims of Voter Fraud*, FIVETHIRTYEIGHT (May 11, 2017), <https://fivethirtyeight.com/features/trump-noncitizen-voters/> [https://perma.cc/DKZ4-EGQA] ("If we lose in November, Trump told the supporters in Green Bay, it'll be because the election is rigged by millions of fraudulent voters—many of them illegal immigrants.").

<sup>195</sup> Amy Gardner, *Without Evidence, Trump and Sessions Warn of Voter Fraud in Tuesday's Elections*, WASH. POST (Nov. 5, 2018), <https://buff.ly/2SJgLjH> [https://perma.cc/X7QD-WTS5]; see also Dave Quinn, *Trump Claims—Without Proof—That Voters Changed*

California “admitted” they allowed “a million” illegal votes in the 2016 presidential election.<sup>196</sup>

Trump’s disinformation on immigrants and his immigration policy is similarly profuse and fantastical.<sup>197</sup> For example, Trump has repeatedly blamed Obama and the Democrats for his decision to separate children from their parents at the southern border.<sup>198</sup> In fact, Trump was responsible for the family separation policy, as evidenced by his Executive Order revoking it.<sup>199</sup> Trump also regularly maligns the character of immigrants themselves,<sup>200</sup> such as falsely linking undocumented immigrants with crime.<sup>201</sup> Indeed, it is a favorite theme of his political rallies.<sup>202</sup>

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*Clothes to Cast Ballots Twice in Midterms*, PEOPLE.COM (Nov. 15, 2018), <https://people.com/politics/trump-claims-voters-changed-clothes-to-vote-twice/> [<https://perma.cc/QM78-BJSZ>].

<sup>196</sup>Chris Nichols, *Pants on Fire: Trump’s Latest California Voter Fraud Claim as Baseless as Past Allegations*, POLITIFACT (June 24, 2019), <https://www.politifact.com/factchecks/2019/jun/24/donald-trump/pants-fire-trumps-latest-california-voter-fraud-cl/> [<https://perma.cc/XR28-BASP>]; see also Amy Sherman, *Trump Tweets That 58,000 Noncitizens Voted in Texas. That Hasn’t Been Proven*, POLITIFACT (Jan. 28, 2019), <https://www.politifact.com/truth-o-meter/statements/2019/jan/28/donald-trump/trump-wrongly-tweets-58000-noncitizens-voted-texas/> [<https://perma.cc/GWF2-W4XZ>] (rating claim as false).

<sup>197</sup>See Glenn Kessler, Salvador Rizzo, & Meg Kelly, *President Trump Has Made 4,713 False or Misleading Claims in 592 Days*, WASH. POST (Sept. 4, 2018), [https://www.washingtonpost.com/politics/2018/09/04/president-trump-has-made-false-or-misleading-claims-days/?utm\\_term=.d8c1e2ab0f1e](https://www.washingtonpost.com/politics/2018/09/04/president-trump-has-made-false-or-misleading-claims-days/?utm_term=.d8c1e2ab0f1e) [<https://perma.cc/VX2Z-6K5K>] (noting that “immigration is the top source of Trump’s misleading claims”).

<sup>198</sup>Julie Hirschfeld Davis, *Trump Again Falsely Blames Democrats for His Separation Tactic*, N.Y. TIMES (June 16, 2018), <https://www.nytimes.com/2018/06/16/us/politics/trump-democrats-separation-policy.html> [<https://perma.cc/MB9T-D46B>]; Brian Naylor, *Fact Check: Trump Wrongly States Obama Administration Had Child Separation Policy*, NPR (Apr. 9, 2019), <https://www.npr.org/2019/04/09/711446917/fact-check-trump-wrongly-states-obama-administration-had-child-separation-policy> [<https://perma.cc/2WMW-4PTJ>]; Miriam Valverde, *Donald Trump, Again, Falsely Says Obama Had Family Separation Policy*, POLITIFACT (June 21, 2019), <https://www.politifact.com/truth-o-meter/statements/2019/jun/21/donald-trump/donald-trump-again-falsely-says-obama-had-family-s/> [<https://perma.cc/XV2C-GMAV>]. See generally *infra* notes 227–28 and accompanying text (describing the family separation policy).

<sup>199</sup>See Lauren Gambino & Oliver Laughland, *Donald Trump Signs Executive Order to End Family Separations*, GUARDIAN (June 20, 2018), <https://www.theguardian.com/us-news/2018/jun/20/donald-trump-pledges-to-end-family-separations-by-executive-order> [<https://perma.cc/7WEX-LKR5>].

<sup>200</sup>See *infra* notes 213–15 and accompanying text.

<sup>201</sup>See Jennifer Rubin, *Here’s More Proof Trump’s ‘Crime Wave’ Is Fake*, WASH. POST (Dec. 6, 2018), [https://www.washingtonpost.com/opinions/2018/12/06/heres-more-proof-trumps-crime-wave-is-fake/?utm\\_term=.8fac225cfa0b](https://www.washingtonpost.com/opinions/2018/12/06/heres-more-proof-trumps-crime-wave-is-fake/?utm_term=.8fac225cfa0b) [<https://perma.cc/7V94-JMBD>] (“Since he began his campaign in 2015, Donald Trump has insisted . . . on the notion that illegal immigrants are causing a massive crime wave.”).

<sup>202</sup>See Jill Colvin, *Trump Kicks Off Rally Blitz with Grievances, Immigrant Fears*, ASSOCIATED PRESS (Oct. 31, 2018), <https://www.apnews.com/26b868b90386479eb221b42>

This propaganda has been widely and repeatedly debunked by media and experts from across the political spectrum.<sup>203</sup> Multiple academic studies,<sup>204</sup> courts,<sup>205</sup> and government investigations<sup>206</sup> have all concluded that voter fraud is rare.<sup>207</sup> Furthermore, no local official in California, Virginia, or New Hampshire named a single instance of a noncitizen voting,<sup>208</sup> and the rate of noncitizen voting in the 2016 election was .0001%.<sup>209</sup> Trump's attempt to link immigrants with crime is also specious, with numerous studies showing immigrants commit fewer crimes than those born in the United States.<sup>210</sup> In sum,

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65697265c (on file with the *Ohio State Law Journal*) ("The president has been stoking fears that the nation is under attack from an onslaught of dangerous immigrants in the country illegally[.]"); Dominique Mosbergen, *Are Undocumented Immigrants Bringing Crime to the U.S.? Study Says Nope.*, HUFFPOST (May 14, 2019), [https://www.huffpost.com/entry/undocumented-immigration-crime-marshall-project\\_n\\_5cda71f4e4b0f7ba48aa005a](https://www.huffpost.com/entry/undocumented-immigration-crime-marshall-project_n_5cda71f4e4b0f7ba48aa005a) [<https://perma.cc/KTE9-VLBQ>] ("Just last week, Trump declared during a Florida rally that an 'invasion' of immigrants were bringing in an 'unbelievable' amount of crime.").

<sup>203</sup> *In Their Own Words: Officials Refuting False Claims of Voter Fraud*, BRENNAN CTR. FOR JUST. (Apr. 13, 2017), <https://www.brennancenter.org/our-work/research-reports/their-own-words-officials-refuting-false-claims-voter-fraud> [<https://perma.cc/VJU3-8CR6>] (including refutations by a long list of officials, including numerous Republicans).

<sup>204</sup> See, e.g., LORRAINE C. MINNITE, *THE POLITICS OF VOTER FRAUD* 3 (Mar. 2007), [http://www.projectvote.org/wp-content/uploads/2007/03/Politics\\_of\\_Voter\\_Fraud\\_Final.pdf](http://www.projectvote.org/wp-content/uploads/2007/03/Politics_of_Voter_Fraud_Final.pdf) [<https://perma.cc/E243-CHCN>] (noting that only about eight people a year are convicted/plead guilty to illegal voting at the federal level and concluding "[v]oter fraud is extremely rare").

<sup>205</sup> See, e.g., *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 235 (4th Cir. 2016) (striking North Carolina's voter ID requirement and finding "the State has failed to identify even a single individual who has ever been charged with committing in-person voter fraud in North Carolina").

<sup>206</sup> Cf. Marina Villeneuve, *Report: Trump Commission Did Not Find Widespread Voter Fraud*, PBS NEWSHOUR (Aug. 3, 2018), <https://www.pbs.org/newshour/politics/report-trump-commission-did-not-find-widespread-voter-fraud> [<https://perma.cc/HBM2-8XN6>] (reporting that Trump's disbanded Presidential Commission on Election Integrity "uncovered no evidence to support claims of widespread voter fraud").

<sup>207</sup> See *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUST. (Jan. 31, 2017), <https://www.brennancenter.org/analysis/debunking-voter-fraud-myth> [<https://perma.cc/Q9MY-RZMY>] (linking to dozens of sources debunking the claim).

<sup>208</sup> CHRISTOPHER FAMIGHETTI, DOUGLAS KEITH, & MYRNA PÉREZ, BRENNAN CTR. FOR JUST., *NONCITIZEN VOTING: THE MISSING MILLIONS* 2 (May 2017), [https://www.brennancenter.org/sites/default/files/2019-08/Report\\_2017\\_NoncitizenVoting\\_Final.pdf](https://www.brennancenter.org/sites/default/files/2019-08/Report_2017_NoncitizenVoting_Final.pdf) [<https://perma.cc/LC47-BX25>] ("In California, Virginia and New Hampshire—the states where Trump claimed the problem of noncitizen voting was especially acute—no official we spoke with identified an incident of noncitizen voting in 2016.").

<sup>209</sup> *Id.* at 1 ("Across 42 jurisdictions, election officials who oversaw the tabulation of 23.5 million votes in the 2016 general election referred only an estimated 30 incidents of suspected noncitizen voting for further investigation or prosecution. In other words, improper noncitizen votes accounted for 0.0001 percent of the 2016 votes in those jurisdictions.").

<sup>210</sup> Chris Nichols, *Mostly True: Undocumented Immigrants Less Likely to Commit Crimes than U.S. Citizens*, POLITIFACT (Aug. 3, 2017), <https://www.politifact.com/>

Trump's (racist-tinged) lies about immigrants have been thoroughly rebutted by reputable sources almost as often as he advances them.<sup>211</sup>

All these verifiably false statements of facts on policy issues probably qualify as propaganda.<sup>212</sup> The one exception may be certain racist attacks on immigrants. Calling Mexicans "rapists"<sup>213</sup> or dehumanizing undocumented people as "animals"<sup>214</sup> that "infest" our country,<sup>215</sup> despite seeming to come out of a propaganda handbook, cannot be taken as a statement of fact. Recall that in

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california/statements/2017/aug/03/antonio-villaraigosa/mostly-true-undocumented-immigrants-less-likely-co/ [https://perma.cc/6FKY-UAJM] (summarizing several studies, including a 2015 National Academy of Sciences one finding that immigrants, including undocumented immigrants, are less likely to commit crimes than natives); *see also, e.g.*, Ryan Bort, *Study: There's No Correlation Between Undocumented Immigration and Violent Crime*, ROLLING STONE (May 13, 2019), <https://www.rollingstone.com/politics/politics-news/study-undocumented-immigration-violent-crime-834842/> (on file with the *Ohio State Law Journal*); John Burnett, *Illegal Immigration Does Not Increase Violent Crime, 4 Studies Show*, NPR (May 2, 2018), <https://www.npr.org/2018/05/02/607652253/studies-say-illegal-immigration-does-not-increase-violent-crime> [https://perma.cc/Z9TV-E99V] ("[F]our academic studies show that illegal immigration does not increase the prevalence of violent crime or drug and alcohol problems."); Dianne Solis, *New Study Says Immigrants Commit Crimes Less Often in Texas than Those Born in the U.S.*, DALL. MORNING NEWS (Feb. 26, 2018), <https://www.dallasnews.com/news/immigration/2018/02/26/new-study-says-immigrants-commit-crimes-less-often-texas-born-us> [https://perma.cc/49HA-C2WR] (reporting that a Cato Institute study found that "unauthorized immigrants had a criminal conviction rate 56 percent below that of the native-born people").

<sup>211</sup> Each new study likewise refutes them. *See, e.g.*, Anna Flagg, *Is There a Connection Between Undocumented Immigrants and Crime?*, MARSHALL PROJ. (May 13, 2019), <https://www.themarshallproject.org/2019/05/13/is-there-a-connection-between-undocumented-immigrants-and-crime> [https://perma.cc/Q9DK-U87Z] ("An analysis derived from new data . . . suggest[s] that growth in illegal immigration does not lead to higher local crime rates.").

<sup>212</sup> I leave open the possibility that a Trump claim falls into the "contested knowledge" rather than "anti-knowledge" category. *See generally supra* notes 116–20 and accompanying text.

<sup>213</sup> At the beginning of his candidacy, Trump insulted Mexican immigrants in the United States by calling them rapists who brought crime and drugs with them. Andre M. Perry, *Racism Is Not a Distraction; It's Policy*, BROOKINGS INST. (July 19, 2019), <https://www.brookings.edu/blog/the-avenue/2019/07/19/racism-is-not-a-distraction-its-policy/> [https://perma.cc/N9HP-96JL] (quoting Trump: "When Mexico sends its people, they're not sending their best . . . They're bringing drugs, they're bringing crime. They're rapists and some, I assume, are good people[.]").

<sup>214</sup> *E.g.*, Gregory Korte & Alan Gomez, *Trump Ramps Up Rhetoric on Undocumented Immigrants: 'These Aren't People. These Are Animals.'* USA TODAY (May 17, 2018), <https://www.usatoday.com/story/news/politics/2018/05/16/trump-immigrants-animals-mexico-democrats-sanctuary-cities/617252002/> [https://perma.cc/A4DM-ZZRW] (quoting Trump).

<sup>215</sup> Brooke Seipel, *Trump: Dems Want Illegal Immigrants to 'Infest Our Country.'* HILL (June 6, 2018), <https://thehill.com/homenews/administration/392977-trump-dems-want-illegal-immigrants-to-infest-our-country> [https://perma.cc/TAZ7-QGGV] (quoting Trump tweets).

the interests of workability, my definition of propaganda focuses on manipulating audiences by lying rather than manipulating audiences by appealing to their (baser) emotions.

Trump has shown no inclination to stop. Usually when politicians are caught in a blatant lie (as opposed to just misleading spin), they offer a justification or apology.<sup>216</sup> Trump, on the other hand, refuses to play by these established rules of the game.<sup>217</sup> When asked point blank, “Do you think that talking about millions of illegal votes is dangerous to this country, without presenting the evidence?” Trump responded, “No, not at all, because many people feel the same way that I do. . . . Millions of people agree with me when I say that.”<sup>218</sup>

Those in Trump’s Administration seem to have followed in his footsteps. Most of their lies are either cover-up lies (for Trump or for themselves) or policy disinformation lies.<sup>219</sup> Either way, Trump’s appointments take their cue from the dishonest tone that Trump has set for his Administration. “High-ranking administration officials regularly stand before the public and say things that plainly aren’t true.”<sup>220</sup>

From the very beginning, Trump appointees have lied in an attempt to bolster Trump’s lies.<sup>221</sup> The morning after his inauguration, Trump attacked the

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<sup>216</sup> Sergio Sismondo, Editorial, *Post-Truth?*, 47 SOC. STUD. SCI. 3, 3 (2017) (“When caught lying outright . . . [most politicians] provide complex justifications and near-apologies. The Trump campaign abandoned that game.”).

<sup>217</sup> See Pfiffner, *supra* note 191 (“When previous presidents have been caught making false statements, they have usually tried to equivocate or claim that they were technically not lying . . . . Trump expects others to accept his version of reality, and when they do not, he responds with ad hominem attacks and charges of ‘fake news.’”).

<sup>218</sup> Graham Vyse, *Donald Trump Says It’s Okay for Him to Lie Since “People Agree with Me”*, NEW REPUBLIC (Jan. 25, 2017), <https://newrepublic.com/minutes/140136/donald-trump-says-its-okay-lie-since-people-agree-me> [<https://perma.cc/YQ4A-KCFG>] (quoting an ABC News interview).

<sup>219</sup> See, e.g., The Editorial Bd., *Presidential Lying Is Contagious*, N.Y. TIMES (Sept. 23, 2018), <https://www.nytimes.com/2018/09/23/opinion/trump-lies-white-house-dishonesty.html> [<https://perma.cc/SWP7-VKRY>] (providing multiple examples of Trump administration officials lying to advance Trump’s agenda); see also Jennifer Rubin, *Trump Lies All the Time. And Yet the Toadies Keep Covering for Him*, WASH. POST (June 11, 2019), [https://www.washingtonpost.com/opinions/2019/06/11/trump-lies-all-time-yet-toadies-keep-covering-him/?utm\\_term=.f2eb827f952f](https://www.washingtonpost.com/opinions/2019/06/11/trump-lies-all-time-yet-toadies-keep-covering-him/?utm_term=.f2eb827f952f) [<https://perma.cc/536R-87R2>] (“To work for Trump is to inevitably and repeatedly lie for him.”).

<sup>220</sup> Matthew Yglesias, *The Dense Thicket of Lies Around Obamacare Repeal Makes It Hard to Tell What’s Happening*, VOX (May 10, 2017), <https://www.vox.com/policy-and-politics/2017/5/10/15592228/ahca-senate-lies> (on file with the *Ohio State Law Journal*).

<sup>221</sup> See Paul Waldman, *In the Trump Administration, Everyone Becomes a Liar*, AM. PROSPECT (Oct. 23, 2017), <http://prospect.org/article/trump-administration-everyone-becomes-liar> [<https://perma.cc/E3NH-UJH7>] (“There’s a cycle that repeats itself in some variation again and again: Trump lies about something, then when it gets pointed out he doubles down, insisting that he didn’t lie, then someone gets sent out to defend him and usually ends up telling more lies, then the White House insists that not only did no one tell any lies, but the media should just shut up about it.”).



press for underestimating the number of inauguration attendees.<sup>222</sup> At his first briefing, Trump's White House Communications Director falsely stated that Trump had "the largest audience to witness an inauguration, period. Both in person and around the globe."<sup>223</sup> It was the first of many such attempts by people in the Trump Administration to defend Trump's falsehoods.<sup>224</sup> The cover-up efforts continued when Trump officials and supporters attempted to justify Trump's Ukrainian dealings that led to his impeachment,<sup>225</sup> and they have not ceased.

Other lies relate to policy. The lies told by former Department of Homeland Security Secretary Kirstjen Nielsen about the family separation policy mentioned above is a case in point.<sup>226</sup> As part of a new "zero tolerance" immigration policy, parents crossing illegally were put in jail, and their children put in detention centers.<sup>227</sup> As a consequence, children, toddlers, and even

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<sup>222</sup> Lori Robertson & Robert Farley, *Fact Check: The Controversy over Trump's Inauguration Crowd Size*, USA TODAY (Jan. 24, 2017), <https://www.usatoday.com/story/news/politics/2017/01/24/fact-check-inauguration-crowd-size/96984496/> [https://perma.cc/WS56-NK76].

<sup>223</sup> Linda Qiu, *Donald Trump Had the Biggest Inaugural Crowd Ever? Metrics Don't Show It*, POLITIFACT (Jan. 21, 2017), <http://www.politifact.com/truth-o-meter/statements/2017/jan/21/sean-spicer/trump-had-biggest-inaugural-crowd-ever-metrics-don/> [https://perma.cc/QPT7-SR7C] (rating the claim as a "Pants on Fire" lie). Sean Spicer later said he regretted this lie. Rachel Chason, *Sean Spicer Says He 'Absolutely' Regrets Crowd-Size Briefing*, WASH. POST (Sept. 19, 2017), [https://www.washingtonpost.com/news/the-fix/wp/2017/09/18/sean-spicer-says-he-absolutely-regrets-crowd-size-briefing/?utm\\_term=.2ae1db341f5f](https://www.washingtonpost.com/news/the-fix/wp/2017/09/18/sean-spicer-says-he-absolutely-regrets-crowd-size-briefing/?utm_term=.2ae1db341f5f) [https://perma.cc/CLT7-6WRS].

<sup>224</sup> See Greg Sargent, *Not Just Sharpie-Gate: 7 Other Times Officials Tried to Fabricate Trump's 'Truth'*, WASH. POST (Sept. 5, 2019), <https://www.washingtonpost.com/opinions/2019/09/05/not-just-sharpie-gate-other-times-officials-tried-fabricate-trumps-truth/> [https://perma.cc/CHX6-D5YE] (describing how Trump displayed "a chart that appeared to be doctored with a Sharpie to retroactively demonstrate that [Trump] had been right when he falsely warned that Alabama was threatened by Hurricane Dorian"); see also *id.* (listing other examples of "government officials . . . using 'federal resources in vain attempts to turn the president's lies into truth'").

<sup>225</sup> See, e.g., Brakkton Booker, *Mike Pompeo Says Ukraine, 2016 Election Interference Should Be Investigated*, NPR (Nov. 26, 2019), <https://www.npr.org/2019/11/26/782997962/mike-pompeo-says-ukraine-2016-election-interference-should-be-investigated> [https://perma.cc/U2QF-X4J7] (perpetuating conspiracy theory debunked by US Intelligence but pushed by Trump); see also J.M. Rieger, *The 30 Defenses Trump's Allies Have Floated on Ukraine and Impeachment*, WASH. POST (Feb. 7, 2020), <https://www.washingtonpost.com/politics/2019/11/18/defenses-trumps-allies-have-floated-ukraine-impeachment/> [https://perma.cc/P59K-SUCB].

<sup>226</sup> See John Nichols, *Kirstjen Nielsen Lied to Congress About Trump's War on Migrant Children*, NATION (Jan. 18, 2019), <https://www.thenation.com/article/kirstjen-nielsen-family-separation-perjury-merkley/> (on file with the *Ohio State Law Journal*) [hereinafter Nichols, *Nielsen*] (reporting that Nielsen declared to Congress on December 20, 2018, "I'm not a liar, we've never had a policy for family separation").

<sup>227</sup> Camila Domonoske & Richard Gonzales, *What We Know: Family Separation and 'Zero Tolerance' at the Border*, NPR (June 19, 2018), <https://www.npr.org/2018/06/19/621065383/what-we-know-family-separation-and-zero-tolerance-at-the-border> [https://perma.cc/

infants were taken from their parents.<sup>228</sup> Nevertheless, Nielsen repeatedly insisted that no such family separation policy existed: “We do not have a policy of separating families at the border. Period.”<sup>229</sup> More falsehoods followed.<sup>230</sup> Finally, like the man who appointed her, Nielsen lied about who was responsible for the policy by attempting to blame the Democrats.<sup>231</sup>

## 2. Unprecedented Reach

Not only is the sheer quantity of patently false government speech unprecedented, so that characterizing it as propaganda is less rhetorical than descriptive, so too is the ability for these lies to reach an audience predisposed to believe them. Thanks to the internet and social media, propaganda can easily and quickly reach millions of receptive viewers.<sup>232</sup>

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C3E2-WGNT]; Maya Rhodan, *Here Are the Facts About Trump’s Separation Policy*, TIME (June 20, 2018), <http://time.com/5314769/family-separation-policy-donald-trump/> [https://perma.cc/9WEP-VM9J].

<sup>228</sup> Garance Burke & Martha Mendoza, *At Least 3 ‘Tender Age’ Shelters Set Up for Child Migrants*, ASSOCIATED PRESS (June 8, 2018), <https://apnews.com/dc0c9a5134d14862ba7c7ad9a811160e> (on file with *Ohio State Law Journal*) (“[T]he children—who have no idea where their parents are—were hysterical, crying and acting out. Many of them are under age 5, and some are so young they have not yet learned to talk.”).

<sup>229</sup> Kirstjen M. Nielsen (@SecNielsen), TWITTER (June 17, 2018, 5:52 PM), <https://twitter.com/SecNielsen/status/1008467414235992069> (on file with the *Ohio State Law Journal*); see also Sarah Sanders, White House Press Sec’y, & Kristjen Nielsen, Sec’y, Dep’t of Homeland Sec., Press Briefing at James S. Brady Press Briefing Room (June 18, 2018), <https://www.whitehouse.gov/briefings-statements/press-briefing-press-secretary-sarah-sanders-department-homeland-security-secretary-kirstjen-nielsen-061818/> [https://perma.cc/7FEG-BXVU] (“First, this administration did not create a policy of separating families at the border.”); Nichols, *Nielsen*, *supra* note 226.

<sup>230</sup> For example, Nielsen denied that the policy was meant to deter migration—despite several other White House officials admitting otherwise. Aaron Blake, *Kirstjen Niensens’s Mighty Struggle to Explain Separating Families at the Border*, *Annotated*, WASH. POST (June 19, 2018), <https://www.washingtonpost.com/news/the-fix/wp/2018/06/19/kirstjen-nielsen-tries-to-explain-separating-families-at-the-border-annotated/> [https://perma.cc/7SUT-XUFT]. She also claimed that the families were not real families but gang members using children to fake a family, despite less than one percent of family units (their association with gangs unknown) deploying that tactic. Sarah Ruiz-Grossman, *Trump Has Lied and Twisted Facts to Justify His Harsh Immigration Policies*, HUFFPOST (June 30, 2018), [https://www.huffingtonpost.com/entry/trump-administration-lies-immigration-family-separations\\_us\\_5b3689cfe4b08c3a8f6a3b73](https://www.huffingtonpost.com/entry/trump-administration-lies-immigration-family-separations_us_5b3689cfe4b08c3a8f6a3b73) [https://perma.cc/E3VX-Q69T].

<sup>231</sup> Bill Chappell & Jessica Taylor, *Defiant Homeland Security Secretary Defends Family Separations*, NPR (June 18, 2018), <https://www.npr.org/2018/06/18/620972542/we-do-not-have-a-policy-of-separating-families-dhs-secretary-nielsen-says> [https://perma.cc/A72D-QPHY] (“Nielsen appeared at the White House press briefing on Monday, falsely blaming Democrats for the current crisis.”).

<sup>232</sup> Cf. Chemerinsky, *supra* note 1, at 3 (“The internet is the most important medium for communication to be developed since the printing press.”).

### a. Widespread Distribution

Social media has facilitated reaching a mass audience almost instantaneously.<sup>233</sup> The potential audience is enormous: Over 2.6 billion people use Facebook, over one billion use Instagram, and 326 million have Twitter accounts.<sup>234</sup> Furthermore, content can be immediately shared, reshared, and reshared again, each time with a click of a button, allowing for exponentially increased distribution.<sup>235</sup> If it is possible for a private individual to reach millions,<sup>236</sup> imagine how many the President of the United States, who has over fifty-five million followers on Twitter<sup>237</sup> and whose every tweet is exhaustively covered by the press, is able to reach. In sum, these technological innovations make possible the rapid and extensive dissemination of disinformation. “On social networks, the reach and effects of information spread occur at such a fast pace and so amplified that distorted, inaccurate or false information acquires a tremendous potential to cause real world impacts, within minutes, for millions of users.”<sup>238</sup> Moreover, unlike newspapers that get tossed, a lie online does not disappear.<sup>239</sup>

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<sup>233</sup> See Syed, *supra* note 1, at 350–51 (“Platforms are designed for fast, frictionless sharing.”).

<sup>234</sup> *Most Popular Social Networks Worldwide as of July 2020, Ranked by Number of Active Users*, STATISTA (July 16, 2020), <https://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/> [<https://perma.cc/S5PB-GBFW>].

<sup>235</sup> For example, Facebook users can “share” any posts in their feed, *Definition of a Facebook Share*, ROCKET MARKETING, <https://www.rocketmarketinginc.com/faq/definition/facebook-share> [<https://perma.cc/TH4Y-7ZMJ>], while Twitter users can “retweet” any in theirs, *How to Retweet*, TWITTER, <https://help.twitter.com/en/using-twitter/how-to-retweet> [<https://perma.cc/GQU4-WQT6>]. Instagram users can “Add This to Your Story” if the original poster tagged them or had a public account. Zainab Hasnain, *How To Use Instagram Stories Like a Pro*, VERGE (July 1, 2017), <https://www.theverge.com/2017/7/1/15889750/instagram-stories-how-to-tips-features-tricks> (on file with the *Ohio State Law Journal*).

<sup>236</sup> Hunt Allcott & Matther Gentzkow, *Social Media and Fake News in the 2016 Election*, 31 J. ECON. PERSP. 211, 211 (2017) (“An individual user with no track record or reputation can in some cases reach as many readers as Fox News, CNN, or the *New York Times*.”).

<sup>237</sup> But see Ana Campoy, *More Than 60% of Donald Trump’s Twitter Followers Look Suspiciously Fake*, QUARTZ (Oct. 12, 2018), <https://qz.com/1422395/how-many-of-donald-trumps-twitter-followers-are-fake/> [<https://perma.cc/LV4B-EDCG>].

<sup>238</sup> Alvaro Figueira & Luciana Oliveira, *The Current State of Fake News: Challenges and Opportunities*, 121 PROCEDIA COMPUTER SCI. 817, 817 (2017).

<sup>239</sup> Chemerinsky, *supra* note 1, at 5 (“Now, though, [the falsehood] can be quickly spread across the internet and likely will be there to be found forever. It is enormously difficult, if not impossible, to erase something from the internet.”); Denise Clifton, *Trump’s Lies Have Grown Far More Frequent—and More Dangerous*, MOTHER JONES (Sept. 19, 2018), <https://www.motherjones.com/politics/2018/09/trump-lies-endangering-american-democracy-rand/> [<https://perma.cc/62WR-N2TV>] (quoting Jennifer Kavanaugh, co-author of RAND report on “Truth Decay,” as saying that false information online spreads both “quickly and easily,” and “once it’s online, it lives there in perpetuity”).

The distribution of disinformation is further aided by the fact that false and outrageous propaganda is more likely to “go viral” than the truth.<sup>240</sup> During the 2016 election, the most popular fake news stories on Facebook reached more people than the most popular mainstream news stories.<sup>241</sup> One comprehensive M.I.T. study published in *SCIENCE* concluded that accurate news simply cannot compete with lies: “Falsehood diffused significantly farther, faster, deeper, and more broadly than the truth in all categories of information, and the effects were more pronounced for false political news[.]”<sup>242</sup> Because the truth was much less likely to be retweeted,<sup>243</sup> truth took six times as long as falsehood to reach 1,500 people.<sup>244</sup> People are more apt to share novel information, and lies tend to be more novel than truth.<sup>245</sup> Sometimes truth may be stranger than fiction, but usually it is not.

### b. *Receptive Audience*

Unfortunately, this false information too often finds a receptive audience. Most adults receive at least some of their news through social media,<sup>246</sup> and technology has allowed customization in a way unimaginable before the internet and social media.<sup>247</sup>

First, the explosion of news sources allows for individualized consumption of news—a “Daily Me.”<sup>248</sup> Gone are the days when the choices for the evening news were a more or less interchangeable ABC, CBS, or NBC that everyone

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<sup>240</sup> See Soroush Vosoughi, Deb Roy & Sinan Aral, *The Spread of True and False News Online*, 359 *SCIENCE* 1146, 1146 (2018).

<sup>241</sup> Allcott & Gentzkow, *supra* note 236, at 212.

<sup>242</sup> Vosoughi et al., *supra* note 240, 1146.

<sup>243</sup> *Id.* at 1149 (finding that lies were 70% more likely to be retweeted than the truth).

<sup>244</sup> *Id.* at 1148.

<sup>245</sup> See *id.* at 1146.

<sup>246</sup> Katerina Eva Matsa & Elisa Shearer, *News Use Across Social Media Platforms 2018*, PEW RES. CTR. (Sept. 10, 2018), <https://www.journalism.org/2018/09/10/news-use-across-social-media-platforms-2018/> [<https://perma.cc/T6BB-AHK9>] (finding that 68% of American adults get news on social media and 71% of Twitter users get news on Twitter).

<sup>247</sup> Cf. Gordon Hull, *Why Social Media May Not Be So Good for Democracy*, CONVERSATION (Nov. 5, 2017), <https://theconversation.com/why-social-media-may-not-be-so-good-for-democracy-86285> [<https://perma.cc/7PLN-UYD6>] (“Inside a filter bubble, individuals basically receive only the kinds of information that they have either preselected, or, more ominously, that third parties have decided they want to hear.”).

<sup>248</sup> CASS R. SUNSTEIN, #REPUBLIC: DIVIDED DEMOCRACY IN THE AGE OF SOCIAL MEDIA 1–3 (2017) (describing a hypothetical “communications package just for you, with each component fully chosen in advance”); Eytan Bakshy, Solomon Messing, & Lada A. Adamic, *Exposure to Ideologically Diverse News and Opinion on Facebook*, 348 *SCIENCE* 1130, 1130 (2015) (“Information abundance provides individuals with an unprecedented number of options, shifting the function of curating content from newsroom editorial boards to individuals, their social networks, and manual or algorithmic information sorting.”).

watched.<sup>249</sup> “There is no Walter Cronkite for all Americans to trust anymore.”<sup>250</sup> These news gatekeepers used to provide a common baseline of accepted facts.<sup>251</sup> Now, people are able to and often do pick and choose news, or “news,” that reflects their worldview.<sup>252</sup> That is, people are becoming increasingly siloed in their news consumption, relying on sources that confirm their pre-existing views.<sup>253</sup> Studies show that this is especially true for Trump voters, who have an affinity for conservative media such as Fox News and Breitbart.<sup>254</sup> Moreover, other contributors to people’s feed, such as those befriended or followed, tend to be likeminded,<sup>255</sup> further reinforcing their particular worldview.<sup>256</sup>

Second, because it is in the social media platforms’ economic interest to display content that customers like and engage with,<sup>257</sup> the platforms’

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<sup>249</sup> Shanto Iyengar & Kyu S. Hahn, *Red Media, Blue Media: Evidence of Ideological Selectivity in Media Use*, 59 J. COMM. 19, 20 (2009) (“Forty years ago, the great majority of Americans got their daily news from one of three network newscasts [that] offered a homogenous and generic ‘point-counterpoint’ perspective on the news, thus ensuring that exposure to the news was a common experience.”).

<sup>250</sup> Hasen, *Cheap Speech*, *supra* note 1, at 204.

<sup>251</sup> Verstraete & Bambauer, *supra* note 1, at 131–32; *see also id.* at 129–30 (arguing that unlike the old gatekeepers, whose goal was production of truth, the goal of the new social media gatekeepers is increased traffic).

<sup>252</sup> Iyengar & Hahn, *supra* note 249, at 35 (finding evidence that “people prefer to encounter information that they find supportive or consistent with their existing beliefs”).

<sup>253</sup> Nabeel Gillani, Ann Yuan, Martin Saveski, Soroush Vosoughi, & Deb Roy, *Me, My Echo Chamber, and I: Introspection on Social Media Polarization*, in WWW 2018: PROCEEDINGS OF THE 2018 WORLD WIDE WEB CONFERENCE 823–24 (2018), [https://dl.acm.org/doi/pdf/10.1145/3178876.3186130?casa\\_token=Om4NxY-E3TMAAAA A:tfQHE9QNZURo0956njA8aV-mHJJhLDGq-q0aA9YGC\\_I0pCmyyydGat1Idwyjk9SvGVNgDOqveUQtKg](https://dl.acm.org/doi/pdf/10.1145/3178876.3186130?casa_token=Om4NxY-E3TMAAAA A:tfQHE9QNZURo0956njA8aV-mHJJhLDGq-q0aA9YGC_I0pCmyyydGat1Idwyjk9SvGVNgDOqveUQtKg) [<https://perma.cc/2NZQ-RQYW>].

<sup>254</sup> Benkler et al., *Study*, *supra* note 9 (noting that Clinton supporters “were highly attentive to traditional media outlets” but Trump supporters inhabited a “distinct and insulated” right-wing media system anchored around Breitbart that “transmit[ed] a hyper-partisan perspective”); *see also id.* (“[O]ur study suggests that polarization was asymmetric.”); Jeffrey Gottfried, Michael Barthel, & Amy Mitchell, *Trump, Clinton Voters Divided in Their Main Source for Election News*, PEW RES. CTR. (Jan. 18, 2017), <http://www.journalism.org/2017/01/18/trump-clinton-voters-divided-in-their-main-source-for-election-news/> [<https://perma.cc/8ZG5-FXZD>] (noting that Fox News was the main source of news for 40% of Trump voters).

<sup>255</sup> Allcott & Gentzkow, *supra* note 236, at 221.

<sup>256</sup> Iyengar & Hahn, *supra* note 249, at 34. *But cf.* David Robson, *The Myth of the Online Echo Chamber*, BBC FUTURE (Apr. 16, 2018), <http://www.bbc.com/future/story/20180416-the-myth-of-the-online-echo-chamber> [<https://perma.cc/42F8-5WYP>] (“[S]ome striking recent studies suggest that the influence of echo chambers and filter bubbles may have been over-stated.”).

<sup>257</sup> For example, 98.5% of Facebook’s 2018 revenue was from advertising. Matthew Johnston, *How Facebook Makes Money*, INVESTOPEDIA, <https://www.investopedia.com/ask/answers/120114/how-does-facebook-fb-make-money.asp> [<https://perma.cc/EU5F-NDTP>] (last updated Jan. 12, 2020). Advertising provides at least 86% of Twitter’s revenue. Nathan Reiff, *How Twitter Makes Money*, INVESTOPEDIA, <https://www.investopedia.com/ask/>

algorithms ensure that customers see information that aligns with their political predispositions.<sup>258</sup> Algorithms can curate content with surprising accuracy because of the detailed information our digital footprints provide.<sup>259</sup> A person's posts, purchases, and searches provide both direct evidence of personal preferences as well as data which can be modeled to provide even more information about that individual.<sup>260</sup> For example, one study found that using just ten likes on Facebook, an algorithm was able to infer people's personality better than their work colleagues, and with 300 likes, the algorithm's judgments were better than people's spouses.<sup>261</sup> Thus, computer algorithms help ensure that government propaganda reaches audiences that will appreciate it most.

Third, the information that social media platforms collect can also be used to microtarget advertisements.<sup>262</sup> Before the sophisticated mining of internet

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answers/120114/how-does-twitter-twtr-make-money.asp [https://perma.cc/3YFN-YHKT] (last updated Feb. 19, 2020). The longer people remain on Facebook and Twitter, the more advertising they see. Renee DiResta, *Computational Propaganda: If You Make It Trend, You Make It True*, 106 YALE REV. 12, 16 (2018) ("To serve people ads, those people must be active on the platform. To keep people active on the platform, the platforms needed to show them engaging content.").

<sup>258</sup> See SUNSTEIN, *supra* note 248, at 3–4 (describing power of algorithms); see also Verstraete & Bambauer, *supra* note 1, at 134 ("[S]ocial media platforms . . . monetize popularity rather than credibility.").

<sup>259</sup> Adam Frank, *Computational Propaganda: Bots, Targeting and the Future*, NPR (Feb. 9, 2018), <https://www.npr.org/sections/13.7/2018/02/09/584514805/computational-propaganda-yeah-that-s-a-thing-now> [https://perma.cc/RRE4-CRFK] ("With every 'click,' 'like' and 'follow' we were leaving digital breadcrumbs out in the ether. With the rise of social media, a vast treasure-trove of information was building up that could be mined to predict our preferences, our inclinations and even our future behavior.").

<sup>260</sup> Zeynep Tufekci, *Engineering the Public: Big Data, Surveillance and Computational Politics*, FIRST MONDAY (July 7, 2014), <https://firstmonday.org/article/view/4901/4097> [https://perma.cc/WQN3-7BEZ] (describing how it is possible to predict a range of traits about users from their digital footprint, such that "without asking a single question, researchers were able to model psychological traits as accurately as a psychologist administering a standardized, validated instrument").

<sup>261</sup> Stephan Lewandowsky, Ullrich K.H. Ecker, & John Cook, *Beyond Misinformation: Understanding and Coping with the "Post-Truth" Era*, 6 J. APPLIED RES. MEMORY & COGNITION 353, 360 (2017); see also Michal Kosinski, David Stillwell, & Thore Graepel, *Private Traits and Attributes Are Predictable from Digital Records of Human Behavior*, 110 PROC. NAT'L ACAD. SCI. 5802, 5805 (2013) ("We show that a wide variety of people's personal attributes, ranging from sexual orientation to intelligence, can be automatically and accurately inferred using their Facebook Likes.").

<sup>262</sup> Yochai Benkler, *Election Advertising Disclosure: Part I*, HARV. L. REV. BLOG (Oct. 31, 2017), <https://blog.harvardlawreview.org/election-advertising-disclosure-part-1/> [https://perma.cc/M6TY-5SZD] ("Facebook and Google can deliver advertisements that are finely tuned to very narrowly targeted populations."); Robson, *supra* note 256 ("It's very possible that most people are not at risk of being stuck in an echo chamber, but they are still being targeted with specific ads based on their behaviour, or they are still being targeted with misinformation.").

data,<sup>263</sup> targeting was much less precise.<sup>264</sup> Now, for example, it is possible to identify individual people who would respond to fear-mongering tactics, and single them out for scare ads.<sup>265</sup> As Trump's director of digital advertising explained, the campaign used Facebook's technology "to microtarget on a scale never seen before—and to customize their ads for individual voters."<sup>266</sup> In fact, Trump spent over \$70 million on Facebook ads during his first presidential campaign,<sup>267</sup> and Trump continues to rely heavily on Facebook ads.<sup>268</sup> As one scholar concluded, "There has always been propaganda. But it has not previously been algorithmically amplified and deliberately targeted to reach precisely the people who are most vulnerable. It has never before been so easy to produce or so inexpensive to spread."<sup>269</sup>

Politicians have never been beacons of accuracy. But government propaganda today is unprecedented for modern-day United States. Moreover, this propaganda directly undermines some of the necessary mechanisms of a democracy—mechanisms that are normally supported by free speech. That is, rather than a free flow of information strengthening our democracy, the free flow of government propaganda is weakening it.

#### IV. HARMS OF TODAY'S GOVERNMENT PROPAGANDA

Government propaganda is undermining our democratic process and institutions. To start, it shields elected officials from accountability by obscuring

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<sup>263</sup> Tufekci, *supra* note 260 (noting that "large commercial database[s] may easily contain from [sic] thousands [of] data points on each individual"); *see also* Hull, *supra* note 247 ("Advertising on Facebook works by determining its user's interests, based on data it collects from their browsing, likes and so on. This is a very sophisticated operation.").

<sup>264</sup> Tufekci, *supra* note 260 ("During the broadcast era, most targeting was necessarily course-grained [sic], because TV audiences were measured in broad demographics.").

<sup>265</sup> *Id.*

<sup>266</sup> Lesley Stahl, *Facebook "Embeds," Russia and the Trump Campaign's Secret Weapon*, CBS NEWS (Oct. 8, 2017), <https://www.cbsnews.com/news/facebook-embeds-russia-and-the-trump-campaigns-secret-weapon/> [<https://perma.cc/VE55-RJ9R>]; *see* Napoli, *supra* note 1, at 75 ("Donald Trump's campaign employed a consulting firm, Cambridge Analytica, which drew upon massive amounts of social media data to construct detailed psychological, demographic, and geographic profiles of individual voters [which] were then utilized by the Trump campaign to deliver micro-targeted political messages through social media platforms[.]").

<sup>267</sup> Emily Canal, *Trump's Campaign Spent \$70 Million in Facebook Ads to Win the Election*, INC. (Oct. 9, 2017), <https://www.inc.com/emily-canal/trump-campaign-facebook-60-minutes.html> [<https://perma.cc/XA9X-N6P6>].

<sup>268</sup> Anna Massoglia & Karl Evers-Hillstrom, *2020 Presidential Candidates Top \$100M in Digital Ad Spending as Twitter Goes Dark*, OPENSECRETS.ORG (Nov. 14, 2019), <https://www.opensecrets.org/news/2019/11/digital-ad-spending-2020-presidential-candidates-top-100m/> [<https://perma.cc/UP5M-2EFR>] (noting that Trump is the top spender on digital ads in the 2020 Presidential campaign, having already spent over \$23 million on Facebook and over \$12 million on Google by mid-November 2019).

<sup>269</sup> DiResta, *supra* note 257, at 28.

their misdeeds. Furthermore, the onslaught of government propaganda destabilizes truth itself, which not only hinders the press's ability to perform its watchdog function, but also discourages people from even seeking the truth in the first place. Indeed, this destabilization of truth, along with repetition, cognitive shortcuts, echo chambers, and motivated reasoning, helps explain why government propaganda succeeds. The end result is failure to hold government accountable. Instead of an informed electorate giving or withholding its genuine consent at the ballot box, an ill-informed electorate may be giving or withholding a manipulated or falsified consent.<sup>270</sup>

#### A. *Undermines Democratic Self-Governance*

Government propaganda creates multiple harms. It harms individuals. Indeed, that may be the point of lies about specific political opponents. It harms groups. Racist lies stereotype, dehumanize, and help stoke further discrimination. And, of course, government propaganda disrupts our democracy.<sup>271</sup> Remember that the fundamental premise of democracy in the United States is that our elected officials govern with our consent.<sup>272</sup> If we the people disapprove of the statements they make, the policies they adopt, or the actions they take, we can vote them out of office.<sup>273</sup> But in order to vote wisely, we need to know what those entrusted to serve us have done. We need the truth.

Most obviously, by obfuscating the truth, government propaganda may lead to ill-informed, and some might say falsified, consent.<sup>274</sup> People will make political decisions based not on incomplete or even slightly distorted information, but on patently false information.<sup>275</sup> “[T]ruth is the heart of liberal democracy. . . . If your belief system is shot through with lies, you’re not free.

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<sup>270</sup> MARK G. YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA 152 (1983) (“[G]overnment may so seek to indoctrinate the public as to engineer false consent.”).

<sup>271</sup> These points are not meant to comprehensively catalog the harms of propaganda. The Article focuses particularly on consent and accountability because they are crucial to democratic self-governance, a major justification for protecting free speech.

<sup>272</sup> Eugene V. Rostow, *The Consent of the Governed*, 44 VA. Q. REV. 513, 517 (1968).

<sup>273</sup> See *id.*

<sup>274</sup> See YUDOF, *supra* note 270, at 152; cf. Nat Stern, *Judicial Candidates’ Right to Lie*, 77 MD. L. REV. 774, 781 (2018) (“Rather, dissemination of misinformation to the voting public threatens to defeat the very promise of democratic self-government. The success of this system depends on the ability of citizens to make reasoned choices about the alternative visions they are offered. Citizens who make these selections based on factually false beliefs are more likely to choose poor policies and inferior candidates.”).

<sup>275</sup> See Florian Zollmann, *Bringing Propaganda Back into News Media Studies*, 45 CRITICAL SOC. 329, 331 (2017) (describing propaganda as a means of “consent engineering”).



Nobody thinks of the citizens of North Korea as free, because their actions are controlled by lies.”<sup>276</sup>

In theory, the established media ought to be able to mitigate the harms of government propaganda. After all, in contrast to North Korea, we have a free press, and the press has long played a key role in helping us keep tabs on the government.<sup>277</sup> It earned the nickname the “fourth estate” for a reason: An independent press has a structural role in our democracy.<sup>278</sup> As Sonja West explains, “[A] free press [is] vital to the country’s survival by checking government tyranny and corruption and by monitoring laws and public policies through an informed citizenry.”<sup>279</sup> Unlike individuals, the press has the dedicated time, resources, and expertise to uncover the information citizens need to intelligently discharge their civic duties.<sup>280</sup> “By enabling the public to assert meaningful control over the political process, the press performs a crucial function in effecting the societal purpose of the First Amendment.”<sup>281</sup>

Unfortunately, government propaganda has blunted the press’s effectiveness. Today’s press already has a formidable task. The sheer amount of nonfeasance, malfeasance, and outright corruption (and its propagandistic coverup) of the Trump Administration makes it difficult for journalists to expose it all.<sup>282</sup> But even if journalists were able to discover and report every wrongdoing, news readers are rejecting the mainstream media’s fact-finding.

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<sup>276</sup> Sean Illing, *How Fascism Works*, VOX (Dec. 15, 2018), <https://www.vox.com/2018/9/19/17847110/how-fascism-works-donald-trump-jason-stanley> (on file with the *Ohio State Law Journal*) (quoting Jason Stanley, Professor of Philosophy at Yale University who writes about propaganda).

<sup>277</sup> Delbert Tran, Media Freedom & Info. Access Clinic, *The Fourth Estate as the Final Check*, YALE L. SCH.: CASE DISCLOSED (Nov. 22, 2016), <https://law.yale.edu/mfia/case-disclosed/fourth-estate-final-check> [<https://perma.cc/YC7P-LLHH>].

<sup>278</sup> See, e.g., *id.*

<sup>279</sup> Sonja R. West, *Favoring the Press*, 106 CALIF. L. REV. 91, 108 (2018); see also Randall P. Bezanson, Essay, *Whither Freedom of the Press?*, 97 IOWA L. REV. 1259, 1272 (2012) (arguing that the press serves a structural role “as an avowedly independent source of news and opinion for the public’s benefit, governed by a truth-seeking and public-oriented process of judgment”).

<sup>280</sup> *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 863 (1974) (Powell, J., dissenting) (noting it was “hopelessly unrealistic” for individuals to obtain “the information needed for the intelligent discharge of his political responsibilities”).

<sup>281</sup> *Id.*

<sup>282</sup> Less than a year into Trump’s Administration, one news magazine reported that “[t]he number of White House officials currently facing questions, lawsuits or investigation is astonishing” and listed investigations involving Trump, his family, and multiple Cabinet heads. Alexander Nazaryan, *Trump Is Leading the Most Corrupt Administration in U.S. History, One of First-Class Kleptocrats*, NEWSWEEK (Nov. 2, 2017), <http://www.newsweek.com/2017/11/10/trump-administration-most-corrupt-history-698935.html> (on file with the *Ohio State Law Journal*). For a color-coded interactive summary, see Bill Allison et al., *Trump Team’s Conflicts and Scandals: An Interactive Guide*, BLOOMBERG (Mar. 14, 2019), <https://www.bloomberg.com/graphics/trump-administration-conflicts/> [<https://perma.cc/P3SK-FSV7>].

This rejection is not accidental. As discussed earlier,<sup>283</sup> Trump relentlessly<sup>284</sup>—and falsely—denounces mainstream journalists and papers as liars and accuses them of peddling “fake news.”<sup>285</sup> As Trump no doubt intended, his attacks of the press make people less likely to trust it.<sup>286</sup> Lesley Stahl of CBS said Trump admitted as much: “I do it to discredit you all and demean you all, so when you write negative stories about me, no one will believe you.”<sup>287</sup> The tactic works. As one citizen commented, “I just don’t know what to think. You would have to know the facts, and I don’t know that I’m getting the facts from the media right now.”<sup>288</sup>

The press’s effectiveness is undercut not only by Trump’s attacks on it, but also by Trump’s assault on truth itself. As detailed in Part IV.B., on the mechanisms of government propaganda, the endless stream of government falsehoods has contributed to the widespread destabilization of truth.<sup>289</sup> With truth in crisis—various dictionaries have recently awarded their Word of the

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<sup>283</sup> See *supra* notes 179–83 and accompanying text.

<sup>284</sup> One analysis of Trump’s tweets found that the words “fake,” “phony,” and “dishonest” were not only among his most used words, but also that they almost always referred to the mainstream media. Andrew S. Ross & Damian J. Rivers, *Discursive Deflection: Accusation of “Fake News” and the Spread of Mis- and Disinformation in the Tweets of President Trump*, SOC. MEDIA & SOC’Y, Apr.–June 2018, at 2, 4; see also *id.* at 6 (“The vast majority of Trump’s tweets utilizing the label ‘fake news’ or similar terms . . . served to deliver a blatant accusation toward the mainstream media of not reporting the truth[.]”).

<sup>285</sup> See RonNell Andersen Jones & Lisa Grow Sun, *Enemy Construction and the Press*, 49 ARIZ. ST. L.J. 1301, 1307, 1309–10 (2017) (“The starkness of the chosen terminology—words like ‘dishonest,’ ‘lying,’ ‘failing,’ ‘disgusting,’ ‘third-rate,’ ‘bad,’ and ‘scum’—delegitimized the press beyond the obvious reputational damage attempted.”) (footnotes omitted).

<sup>286</sup> *Id.* at 1344–45 (“[L]abeling those who question or argue with a policy as ‘enemies’ can help undermine their credibility.”); Levi, *supra* note 1, at 258 (“[Attacking the press] is a governance technique designed to identify Trump as the only authoritative source of information and to delegitimize any critical source of news.”).

<sup>287</sup> Jim Rutenberg, *Trump’s Attacks on the News Media Are Working*, N.Y. TIMES (Oct. 28, 2018), <https://www.nytimes.com/2018/10/28/business/media/trumps-attacks-news-media.html> [<https://perma.cc/2ZUG-CAVY>]; see also Ross & Rivers, *supra* note 284, at 2 (noting Trump’s attacks on the press are “deployed as an attempt to deter the public from trusting media reports, especially those critical of his presidency”).

<sup>288</sup> Sabrina Tavernise & Aidan Gardiner, *‘No One Believes Anything’: Voters Worn Out by a Fog of Political News*, N.Y. TIMES (Nov. 18, 2019), <https://www.nytimes.com/2019/11/18/us/polls-media-fake-news.html> [<https://perma.cc/5YF5-8ZFQ>].

<sup>289</sup> Of course, as mentioned earlier, see Solon & Siddiqui, *supra* note 19, our government is not the only source of propaganda and disinformation.

Year to “post-truth,”<sup>290</sup> “fake news,”<sup>291</sup> and “misinformation”<sup>292</sup>—people like the citizen quoted above no longer know what to believe. Not only does this destabilization of truth make them more vulnerable to government lies, it may lead them to disengage from politics altogether.<sup>293</sup> “As the Kremlin has long known, once you’ve successfully swamped truth, you’re no longer accountable for your actions.”<sup>294</sup>

In sum, government propaganda makes it harder for truth to prevail even when it is uncovered. Some citizens, overwhelmed or disengaged, may never come across it. Others who no longer trust the press may greet it with suspicion.<sup>295</sup> Thus, the press may correct a lie or expose a scandal, but these efforts will be for naught if ignored or dismissed as “fake news.”<sup>296</sup> And if the public remains unconvinced about government wrongdoing, then it will not demand changes to the government.

We are able to hold our government officials accountable because we can vote them, or those who appointed them, out of office. In order for our consent-by-vote to be genuine, we need to know what those entrusted to serve us have done. By making it harder to unearth the truth and harder to see it and believe it when it does see the light of day, government propaganda hampers this fundamental democratic process.<sup>297</sup>

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<sup>290</sup> Amy B. Wang, ‘Post-Truth’ Named 2016 Word of the Year by Oxford Dictionaries, WASH. POST (Nov. 16, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/11/16/post-truth-named-2016-word-of-the-year-by-oxford-dictionaries/> [<https://perma.cc/G4PD-MRFM>].

<sup>291</sup> Summer Meza, ‘Fake News’ Named Word of the Year, NEWSWEEK (Nov. 2, 2017), <https://www.newsweek.com/fake-news-word-year-collins-dictionary-699740> (on file with the *Ohio State Law Journal*).

<sup>292</sup> Andrea Diaz, ‘Misinformation’ Is Crowned Dictionary.com’s Word of the Year, CNN (Nov. 26, 2018), <https://www.cnn.com/2018/11/26/us/misinformation-dictionary-word-of-the-year-2018-trnd/index.html> [<https://perma.cc/793M-8VDQ>].

<sup>293</sup> Tavernise & Gardiner, *supra* note 288 (noting that people are “tuning out” amidst a “new normal” where “[m]any people are numb and disoriented, struggling to discern what is real”).

<sup>294</sup> Mike Mariani, *Is Trump’s Chaos Tornado a Move from the Kremlin’s Playbook?*, VANITY FAIR (Mar. 28, 2017), <https://www.vanityfair.com/news/2017/03/is-trumps-chaos-a-move-from-the-kremlins-playbook> [<https://perma.cc/R9CM-ANJT>].

<sup>295</sup> Cf. Jimmeka J. Guillory & Lisa Geraci, *Correcting Erroneous Inferences in Memory: The Role of Source Credibility*, 2 J. APPLIED RES. MEMORY & COGNITION 201, 202 (2013) (noting that two components of credibility are expertise and trustworthiness).

<sup>296</sup> Emma Whitford, *J-School Leaders Say It’s Time to Speak Out*, INSIDE HIGHER ED (Nov. 20, 2018), <https://www.insidehighered.com/news/2018/11/20/leaders-journalism-schools-have-condemned-trumps-attacks-press> [<https://perma.cc/L5C3-A239>] (quoting Dean of Columbia Journalism School as saying “[w]ith such language, the president is evidently seeking to delegitimize the place of an independent, professional press in our constitutional system, for the purpose of weakening it”).

<sup>297</sup> Goldman, *supra* note 146, at 897 (“If voters are misled, elections may not accurately reflect the desires of the electorate.”).

## B. Why Propaganda Succeeds

Do people actually believe this disinformation? Unfortunately, too often the answer is yes. Polls show that many believe Trump's lie that the mainstream press fabricates stories about him: "More than three-quarters of Republican voters, 76 percent, think the news media invent stories about Trump and his administration[.]"<sup>298</sup> Another poll found that "91 percent of 'strong Trump supporters' trust him to provide accurate information; 11 percent said the same about the news media."<sup>299</sup> Meanwhile, over half of Republicans agree that the news media is the "enemy of the people."<sup>300</sup>

Surveys also find that Americans regularly believe the false news they encounter.<sup>301</sup> For example, polls show that people mistakenly worry that voter fraud is a serious problem: 54% of all likely U.S. voters (Republicans and Democrats) said voter fraud is at least a somewhat serious problem (and 27% a very serious problem),<sup>302</sup> while almost three-quarters of Republicans believe

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<sup>298</sup> Steven Shepard, *Poll: 46 Percent Think Media Make Up Stories About Trump*, POLITICO (Oct. 18, 2017), <https://www.politico.com/story/2017/10/18/trump-media-fake-news-poll-243884> [<https://perma.cc/P3J9-B48S>]; see also *id.* (reporting that nearly half of all voters believe that the press is making up news). Support for the media's watchdog role has also declined. During the 2016 primaries, roughly seventy-five percent of both Democrats and Republicans supported it. A more recent survey, however, found that while almost ninety percent of Democrats agreed that "news media criticism keeps leaders in line," only about forty percent of Republicans agreed. Megan Boler & Elizabeth Davis, *The Affective Politics of the "Post-Truth" Era: Feeling Rules and Networked Subjectivity*, 27 EMOTION, SPACE & SOC'Y 75, 76 (2018) (reporting Pew study and the fact it was the widest gap in the 30-year history of tracking this issue).

<sup>299</sup> Rutenberg, *supra* note 287.

<sup>300</sup> Tess Bonn, *Poll: One-Third of Americans Say News Media Is the 'Enemy of the People'*, HILL (July 2, 2019), <https://thehill.com/hilltv/what-americas-thinking/451311-poll-a-third-of-americans-say-news-media-is-the-enemy-of-the-people> [<https://perma.cc/5UVV-V7NL>] (reporting July 2019 poll finding 51% of Republicans and 33% of Americans say "enemy of the people" describes the press better than "an important part of a democracy"). When the question is phrased as "Do you agree with Trump that certain news organizations are the enemy of the American people," over 80% of Republicans (and nearly 40% of all Americans) answered "yes." Philip Bump, *Half of Republicans Say the News Media Should Be Described as the Enemy of the American People*, WASH. POST (Apr. 26, 2018), [https://www.washingtonpost.com/news/politics/wp/2018/04/26/half-of-republicans-say-the-news-media-should-be-described-as-the-enemy-of-the-american-people/?utm\\_term=.b3faecff3a8](https://www.washingtonpost.com/news/politics/wp/2018/04/26/half-of-republicans-say-the-news-media-should-be-described-as-the-enemy-of-the-american-people/?utm_term=.b3faecff3a8) [<https://perma.cc/3BQT-9WUX>].

<sup>301</sup> Craig Silverman & Jeremy Singer-Vine, *Most Americans Who See Fake News Believe It, New Survey Says*, BUZZFEED (Dec. 6, 2016), <https://www.buzzfeednews.com/article/craigsilverman/fake-news-survey> [<https://perma.cc/7YPJ-A9KW>] ("Fake News Headlines Fool Americans about 75% of the time[.]").

<sup>302</sup> *Most Still See Voter Fraud as Serious Problem*, RASMUSSEN REP. (Aug. 10, 2017), [http://www.rasmussenreports.com/public\\_content/politics/general\\_politics/august\\_2017/most\\_still\\_see\\_voter\\_fraud\\_as\\_serious\\_problem](http://www.rasmussenreports.com/public_content/politics/general_politics/august_2017/most_still_see_voter_fraud_as_serious_problem) [<https://perma.cc/2CMG-BMSU>].

that voter fraud happens often.<sup>303</sup> Other polls found that 28% of Americans agree that the 2016 presidential election was marred by voter fraud.<sup>304</sup> In fact, Trump's repeated assertions that he would have won the popular vote but for voter fraud has morphed into about half of Republicans believing Trump in fact won the popular vote in the 2016 election.<sup>305</sup> And this is just the tip of the iceberg.<sup>306</sup>

How are people duped into believing claims so divorced from reality and so easily and repeatedly disproven? This subpart explores several contributing factors, including repetition, cognitive shortcuts, the information landscape, motivated reasoning, and the general destabilization of truth that propaganda creates. Note, though, that the analysis is not exhaustive.

First, repetition is one important reason.<sup>307</sup> Joseph Goebbels, Adolf Hitler's propaganda minister, supposedly said, "Repeat a lie often enough and it becomes the truth."<sup>308</sup> Repetition makes an idea familiar, and we are more apt

<sup>303</sup> Rebecca Savransky, *Poll: Almost Half of Republicans Believe Trump Won Popular Vote*, HILL (Aug. 10, 2017), <https://thehill.com/homenews/administration/346006-poll-almost-half-of-republicans-believe-trump-won-popular-vote> [https://perma.cc/M84M-T59A] (reporting that 73% of Republicans polled thought voter fraud happened somewhat often or very often); see also Philip Bump, *Democrats Worry About Disenfranchisement. Republicans Worry About Voter Fraud*, WASH. POST (July 17, 2018), [https://www.washingtonpost.com/news/politics/wp/2018/07/17/democrats-worry-about-disenfranchisement-republicans-worry-about-voter-fraud/?utm\\_term=.7d9cf25a163f](https://www.washingtonpost.com/news/politics/wp/2018/07/17/democrats-worry-about-disenfranchisement-republicans-worry-about-voter-fraud/?utm_term=.7d9cf25a163f) [https://perma.cc/T7S6-44MR] (reporting PRRI poll that more than two-thirds (68%) of Republicans polled said that voter fraud was a bigger problem than voter disenfranchisement despite studies showing that voter fraud was "almost nonexistent" while disenfranchisement "often happens at a broad scale").

<sup>304</sup> See *infra* note 451 and accompanying text (detailing polls).

<sup>305</sup> Gretel Kauffman, *Why 52 Percent of Republicans Say Donald Trump Won the Popular Vote*, CHRISTIAN SCI. MONITOR (Dec. 18, 2016), <https://www.csmonitor.com/USA/Politics/2016/1218/Why-52-percent-of-Republicans-say-Donald-Trump-won-the-popular-vote> [https://perma.cc/YT5U-BUX8]; Steven Shepard, *Poll: Half of Trump Voters Say Trump Won Popular Vote*, POLITICO (July 26, 2017), <https://www.politico.com/story/2017/07/26/trump-clinton-popular-vote-240966> [https://perma.cc/A9AT-4UUU].

<sup>306</sup> For example, even after Trump finally disavowed his birther claim that President Obama was not born in the United States—a lie Trump tweeted about almost 40 times—a poll from December 2017 showed that 51% of Republicans and 14% of Democrats believed Obama was born in Kenya. Julia Glum, *Some Republicans Still Think Obama Was Born in Kenya as Trump Resurrects Birther Conspiracy Theory*, NEWSWEEK (Dec. 11, 2017), <https://www.newsweek.com/trump-birther-obama-poll-republicans-kenya-744195> (on file with the *Ohio State Law Journal*).

<sup>307</sup> Ullrich K.H. Ecker, Stephan Lewandowsky, Briony Swire, & Darren Chang, *Correcting False Information in Memory: Manipulating the Strength of Misinformation Encoding and Its Retraction*, 18 PSYCHONOMIC BULL. & REV. 570, 571 (2011) ("It is well documented that repetition enhances belief in the truth of repeated assertions[.]").

<sup>308</sup> Tom Stafford, *How Liars Create the 'Illusion of Truth'*, BBC (Oct. 26, 2016), <http://www.bbc.com/future/story/20161026-how-liars-create-the-illusion-of-truth> [https://perma.cc/2RBH-G9LG].

to accept familiar information as true.<sup>309</sup> According to one expert, “Repetition makes things seem more plausible[.] And the effect is likely more powerful when people are tired or distracted by other information.”<sup>310</sup> In short, successful propaganda campaigns mobilize repetition precisely because often-repeated falsehoods take on the veneer of truth.<sup>311</sup>

Second, people assessing persuasiveness often rely on peripheral cues<sup>312</sup>—such as authority and expertise<sup>313</sup>—and government officials, especially the President of the United States, are regularly viewed as possessing both. Their persuasiveness is further bolstered by the fact that they—and again, especially the President—often have access to information that others do not.<sup>314</sup> To compound matters, despite some exceptions, the Office of the President has historically been regarded as a purveyor of accurate information.<sup>315</sup> Even if we

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<sup>309</sup>D.J. Flynn, Brendan Nyhan, & Jason Reifler, *The Nature and Origins of Misperceptions: Understanding False and Unsupported Beliefs About Politics*, 38 ADVANCES POL. PSYCHOL. 127, 142 (2017) (“[W]e tend to believe that familiar information is likely to be true, which may lead us astray if false claims are widespread.”); see also Christina Peter & Thomas Koch, *When Debunking Scientific Myth Fails (and When It Does Not): The Backfire Effect in the Context of Journalistic Coverage and Immediate Judgments as Prevention Strategy*, 38 SCI. COMM. 3, 6 (2016) (“Familiarity is considered as the key determinant of the truth effect.”).

<sup>310</sup>Dreyfuss, *supra* note 94 (quoting Lynn Hasher); see also Lynn Hasher, David Goldstein, & Thomas Toppino, *Frequency and the Conference of Referential Validity*, 16 J. VERBAL LEARNING & VERBAL BEHAV. 107, 111 (1977) (“The present research has demonstrated that the repetition of a plausible statement increases a person’s belief in the referential validity or truth of that statement.”).

<sup>311</sup>See, e.g., O’Shaughnessy, *Hitler*, *supra* note 80 (“The essence of the Nazi propaganda method was repetition.”).

<sup>312</sup>See Corbin, *Disclosures*, *supra* note 88, at 1295–96 (discussing the dual-mode of decision-making, where the second, quicker mode uses cognitive shortcuts). One common cognitive shortcut is reliance on peripheral cues, which are cues that are unrelated to the merits of the argument and can range from expertise to likeability. Richard E. Petty & John T. Cacioppo, *The Elaboration Likelihood Model of Persuasion*, 19 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 123, 186 (1986) (“We have seen that when people are unmotivated and/or unable to process a message, they rely on simple cues in the persuasion context, such as the expertise or attractiveness of the message source.”).

<sup>313</sup>PAUL & MATTHEWS, *supra* note 76, at 7 (“Peripheral cues, such as the appearance of expertise . . . lead people to accept—with little reflection—that the information comes from a credible source.”); Daniel E. Ho & Frederick Schauer, *Testing the Marketplace of Ideas*, 90 N.Y.U. L. REV. 1160, 1169 (2015) (noting peripheral cues may include speaker’s authority and charisma); Petty & Cacioppo, *supra* note 312, at 153 (noting peripheral cues such as “[t]he expertise of the message source . . . permits an assessment of the advocacy without any need to think about the issue-relevant arguments”).

<sup>314</sup>Norton, *supra* note 23, at 79 (arguing that government lies on matters where the government has “special access” may “be especially successful in manipulating listeners”).

<sup>315</sup>Isaac Stanley-Becker, *‘This President Lies Daily’: Critics Demand Networks Fact-Check Trump’s Live Immigration Speech*, WASH. POST (Jan. 8, 2019), [https://www.washingtonpost.com/nation/2019/01/08/this-president-lies-daily-critics-demand-networks-fact-check-trumps-live-immigration-speech/?utm\\_term=.7116b1cbbf50](https://www.washingtonpost.com/nation/2019/01/08/this-president-lies-daily-critics-demand-networks-fact-check-trumps-live-immigration-speech/?utm_term=.7116b1cbbf50)

expect some agenda-furthering spin, it is contrary to tradition for the President of the United States to regularly lie to the public about easily verifiable facts.<sup>316</sup> In short, there is a long-established set of norms surrounding the President's provision of information to the electorate. Trump benefits from those norms at the same time that he violates them.<sup>317</sup>

Third, due to "information silos" and "echo chambers," those who believe the government's propaganda may not be exposed to contrary information.<sup>318</sup> While it is almost impossible for news consumers to avoid what the President and his Administration say on national affairs, it is entirely possible to ignore the debunking of these claims. One study concluded that "fact-checks of fake news almost never reached its consumers."<sup>319</sup> As mentioned earlier, the abundance of news sources allows people to find news that reflects their world view. "[R]ather than search rationally for information that either confirms or disconfirms a particular belief, people actually seek out information that confirms what they already believe."<sup>320</sup> Trump supporters, for example, might read Breitbart and watch Fox News, which are more likely to reaffirm than challenge White House propaganda.<sup>321</sup>

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[<https://perma.cc/4FAU-U2WB>] ("Trump is unlike any president that the country has ever had in the sense that he frequently and routinely says things that are untrue[.]").

<sup>316</sup> Cf. Jack Goldsmith, *Will Donald Trump Destroy the Presidency?*, ATLANTIC (Oct. 2017), <https://www.theatlantic.com/magazine/archive/2017/10/will-donald-trump-destroy-the-presidency/537921/> [<https://perma.cc/37TY-YG6T>] ("Donald Trump is a norm-busting president without parallel in American history. He has told scores of easily disprovable public lies[.]").

<sup>317</sup> Cf. Megan Garber, *The First Lie of the Trump Presidency*, ATLANTIC (Jan. 13, 2019), <https://www.theatlantic.com/politics/archive/2019/01/the-absurdity-of-donald-trumps-lies/579622/> [<https://perma.cc/3MZG-7YCY>] ("[Trump] lies because truth, it turns out, is another norm that can be easily broken, and because a collective fealty to reality, the crucial foundation of any democracy, is for the most part a matter of uneasy covenant.").

<sup>318</sup> See *supra* notes 247–57 and accompanying text.

<sup>319</sup> See generally ANDREW GUESS, BRENDAN NYHAN, & JASON REIFLER, SELECTIVE EXPOSURE TO MISINFORMATION: EVIDENCE FROM THE CONSUMPTION OF FAKE NEWS DURING THE 2016 U.S. PRESIDENTIAL CAMPAIGN (Jan. 2018), <http://www.ask-force.org/web/Fundamentalists/Guess-Selective-Exposure-to-Misinformation-Evidence-Presidential-Campaign-2018.pdf> [<https://perma.cc/66BQ-UJJF>].

<sup>320</sup> Patricia Donovan, *Study Demonstrates How We Support Our False Beliefs*, U. BUFF. NEWS CTR. (Aug. 21, 2009), <http://www.buffalo.edu/news/releases/2009/08/10364.html> [<https://perma.cc/8M8X-4HHY>]; see also Brendan Nyhan & Jason Reifler, *When Corrections Fail: The Persistence of Political Misperceptions*, 32 POL. BEHAV. 303, 307 (2010) ("[R]espondents may engage in a biased search process, seeking out information that supports their preconceptions and avoiding evidence that undercuts their beliefs.").

<sup>321</sup> See generally Jacob L. Nelson, *What Is Fox News? Researchers Want to Know*, COLUM. JOURNALISM REV. (Jan. 23, 2019), [https://www.cjr.org/tow\\_center/fox-news-partisan-propaganda-research.php](https://www.cjr.org/tow_center/fox-news-partisan-propaganda-research.php) [<https://perma.cc/8UW5-L4UZ>].

Fourth, once a belief takes hold, it is very difficult to discard,<sup>322</sup> especially when motivated reasoning kicks in.<sup>323</sup> Our first instinct is to believe what we hear, in part because trust takes less work than doubt. “[W]e instinctively process and accept information to which we are exposed and need to actively resist believing such information when it is false.”<sup>324</sup> Once information is accepted as true, it is hard to shake that belief—even with neutral, nonpolitical information.<sup>325</sup>

It becomes even more difficult to dislodge a mistaken belief if the correction conflicts with one’s worldview.<sup>326</sup> Termed motivated reasoning, “considerable evidence [demonstrates] that people tend to interpret subsequent evidence so as to maintain their initial beliefs.”<sup>327</sup> In other words, this desire to reaffirm pre-existing worldviews affects not only the information people seek<sup>328</sup> but also their analysis of the information they actually confront.<sup>329</sup>

Motivated reasoning may include “a propensity to remember the strengths of confirming evidence but the weaknesses of disconfirming evidence, to judge confirming evidence as relevant and reliable but disconfirming evidence as irrelevant and unreliable, and to accept confirming evidence at face value while scrutinizing disconfirming evidence hypercritically.”<sup>330</sup> In one series of experiments, where researchers presented corrections in a typical news article

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<sup>322</sup>R. Kelly Garrett, Erik C. Nisbet, & Emily K. Lynch, *Undermining the Corrective Effects of Media-Based Political Fact Checking? The Role of Contextual Cues and Naïve Theory*, 63 J. COMM. 617, 617 (2013) (“Political misperceptions are surprisingly resilient.”); see also Peter & Koch, *supra* note 309, at 4 (“Once people have been confronted with a piece of information, it is hard to erase it[.]”).

<sup>323</sup>Nyhan & Reifler, *supra* note 320, at 307 (“[H]umans are goal-directed information processors who tend to evaluate information with a directional bias toward reinforcing their pre-existing views[.]”).

<sup>324</sup>Flynn et al., *supra* note 309, at 142; see also Konnikova, *supra* note 8 (explaining that the brain first accepts information as true and then works to verify it: “It takes work: [w]e must actively choose to accept or reject each statement we hear”).

<sup>325</sup>Briony Swire, Adam J. Berinsky, Stephan Lewandowsky, & Ullrich K. H. Ecker, *Processing Political Misinformation: Comprehending the Trump Phenomenon*, 4 ROYAL SOC’Y OPEN SCI. 1, 2 (2017) (“Once information is assumed to be true, this conviction is subsequently difficult to change . . . even with non-politicized misinformation[.]”).

<sup>326</sup>Flynn et al., *supra* note 309, at 132 (“Directionally motivated reasoning leads people to seek out information that reinforces their preferences (i.e., confirmation bias), counterargue information that contradicts their preferences (i.e., disconfirmation bias), and view proattitudinal information as more convincing than counterattitudinal information (i.e., prior attitude effect).”).

<sup>327</sup>Charles G. Lord, Lee Ross, & Mark R. Lepper, *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098, 2099 (1979).

<sup>328</sup>Flynn et al., *supra* note 309, at 132.

<sup>329</sup>See *id.* at 130.

<sup>330</sup>Lord et al., *supra* note 327, at 2099; see also Swire et al., *supra* note 325, at 2 (“There is an extensive literature on motivated cognition that suggests individuals are more critical when evaluating information that is counter to their beliefs than belief-congruent information[.]”).



format, people failed to revise their beliefs when the corrections ran counter to their preferred views.<sup>331</sup> In fact, some people with strong ideological beliefs not only rejected the unwelcome update but ended up clinging to their original misperception even more strongly—a result the researchers term the “backfire effect.”<sup>332</sup> “[R]esearch indicates that corrective information often fails to change the false or unsupported belief in question . . . . In some cases, corrections can make misperceptions worse.”<sup>333</sup> Thus, even if exposed to the truth, recipients of government propaganda may discount it if it clashes with their pre-existing views.<sup>334</sup>

Fifth, Trump has also made propaganda harder to fight by destabilizing truth itself. Propaganda is not only about convincing you of the truth of a particular claim; instead, it may also aim to make you skeptical of truth itself.<sup>335</sup> “The methodology of [propaganda] isn’t to convince anyone exactly what the truth is, but to make people doubt that the truth exists, or that it can ever be known.”<sup>336</sup> The information space has been inundated with propaganda and corrections, so that “[f]or every fact there is a counterfact. All those counterfactuals and facts look identical online, which is confusing to most people.”<sup>337</sup> That confusion may lead citizens to question whether anything is, in fact, true.<sup>338</sup> In other words, the point of such disinformation may be “to distort information so that no one knows what to believe.”<sup>339</sup>

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<sup>331</sup> Nyhan & Reifler, *supra* note 320, at 304 (“In each of the four experiments . . . ideological subgroups failed to update their beliefs when presented with corrective information that runs counter to their predispositions.”).

<sup>332</sup> *Id.* at 307–08.

<sup>333</sup> Flynn et al., *supra* note 309, at 130; *see also* Swire et al., *supra* note 325, at 2 (“At worst, a potential outcome of the attempt to correct contentious misinformation is worldview backfire effect. This occurs when an individual feels motivated to defend their belief system, and ironically reports a stronger belief in the original misconception after receiving a retraction.”) (emphasis omitted).

<sup>334</sup> Garrett et al., *supra* note 322, at 617 (“Detailed reporting based on thorough research is not always enough to unseat inaccurate political ideas, as people are able to maintain false beliefs in the face of seemingly incontrovertible evidence.”).

<sup>335</sup> Lewandowsky et al., *supra* note 261, at 361 (“[T]he series of overt falsehoods emanating from the White House . . . creates a sense of uncertainty about whether any facts are knowable at all[.]”).

<sup>336</sup> Michael Judge, *Q&A: Garry Kasparov on the Press and Propaganda in Trump’s America*, COLUM. JOURNALISM REV. (Mar. 22, 2017), [https://www.cjr.org/q\\_and\\_a/kasparov-trump-russia-propaganda.php](https://www.cjr.org/q_and_a/kasparov-trump-russia-propaganda.php) [<https://perma.cc/Q9YT-7TQD>].

<sup>337</sup> Richard Gray, *Lies, Propaganda, and Fake News: A Challenge for Our Age*, BBC (Mar. 1, 2017), <https://www.bbc.com/future/article/20170301-lies-propaganda-and-fake-news-a-grand-challenge-of-our-age> [<https://perma.cc/3VC2-659E>].

<sup>338</sup> David A. Graham, *Some Real News About Fake News*, ATLANTIC (June 7, 2019), <https://www.theatlantic.com/ideas/archive/2019/06/fake-news-republicans-democrats/591211/> [<https://perma.cc/G8BV-L3AD>] (“More than making people believe false things, the rise of fake news is making it harder for people to see the truth.”).

<sup>339</sup> Schatz, *supra* note 97.

It works.<sup>340</sup> A recent poll found that nearly half of Americans report that it is difficult to know whether the information they encounter is true or not.<sup>341</sup> As one skeptic acknowledged: “Do I trust anybody? No.”<sup>342</sup> For people who are inclined to agree with Trump, if there is no objective truth, or if it becomes too difficult to discern, they might as well believe what comports with their preexisting beliefs. For people who are not so inclined, the endless flood of lies is so exhausting that they eventually give up and either cease their political participation or succumb to the lies—or both.<sup>343</sup>

To be clear, I am not arguing that government propaganda on its own determines people’s views. For one thing, the government is not the sole source of widespread propaganda.<sup>344</sup> For another, the cause and effect relationship is not straightforward in either direction. Propaganda alone does not change people’s beliefs,<sup>345</sup> and people’s beliefs alone do not cause them to accept propaganda. Rather, the two together create a disinformation feedback loop. Pre-existing beliefs pave the way for the acceptance of propaganda, which solidify the pre-existing beliefs, and so forth.

Lies are not a new phenomenon in the political sphere. “What is perhaps unique to the present situation is the willingness of political actors to promote doubt as to whether truth is ultimately knowable [and] whether empirical evidence is important[.]”<sup>346</sup> In this way, Trump’s propaganda succeeds. People believe his lies and approve policies based on them. It is consent, but thanks, in part, to government manipulation by way of lies, not true consent. “Democracy is premised on an informed electorate. Thus, to the extent that false [propaganda] misinform the voters, they interfere with the process upon which democracy is based.”<sup>347</sup>

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<sup>340</sup> See Illing, *Propoganda Digital Age*, *supra* note 4 (“The main goal is to undercut the very idea of truth and distract the audience.”).

<sup>341</sup> Nicholas Riccardi & Hannah Fingerhut, *AP-NORC/USAFacts Poll: Americans Struggle to ID True Facts*, ASSOCIATED PRESS (Nov. 14, 2019), <https://apnews.com/c762f01370ee4bbe8bbd20f5ddf2adbe> (on file with the *Ohio State Law Journal*); see also Tavernise & Gardiner, *supra* note 288.

<sup>342</sup> Riccardi & Fingerhut, *supra* note 341.

<sup>343</sup> Lewandowsky et al., *supra* note 261, at 361 (“The idea isn’t to convince these people of untrue things, it’s to fatigue them, so that they will stay out of the political process entirely, regarding the truth as just too difficult to determine.”); Konnikova, *supra* note 8 (“When we are overwhelmed with false, or potentially false, statements, our brains pretty quickly become so overloaded that we stop trying to sift through everything . . . . Eventually, without quite realizing it, our brains just give up trying to figure out what is true.”).

<sup>344</sup> See Solon & Siddiqui, *supra* note 19.

<sup>345</sup> But cf. R. Kelly Garrett, *The “Echo Chamber” Distraction: Disinformation Campaigns Are the Problem, Not Audience Fragmentation*, 6 J. APPLIED RES. MEMORY & COGNITION 370, 372 (2017) (“Strategically deployed falsehoods have played an important role in shaping Americans’ attitudes toward a variety of high-profile political issues.”).

<sup>346</sup> *Id.* at 370.

<sup>347</sup> Cf. William P. Marshall, *False Campaign Speech and the First Amendment*, 153 U. PA. L. REV. 285, 294 (2004).

## V. THE FREE SPEECH RIGHT AGAINST GOVERNMENT PROPAGANDA

One remedy for government propaganda lies in the First Amendment itself. The Free Speech Clause exists to promote a marketplace of ideas and democratic self-rule.<sup>348</sup> If government propaganda undermines those core free speech goals, then the Free Speech Clause ought not be sidelined in addressing them. Thus, contrary to existing doctrine, this Article contends that in limited circumstances government speech should be subject to the Free Speech Clause. In particular, the government's propagandistic lies should trigger strict scrutiny.<sup>349</sup> To limit government speech in the name of the First Amendment is an admittedly radical proposal, and it raises several issues. This Part addresses four of them.

First, Part V addresses questions about the scope of the proposed free speech right against government propaganda. Second, it explains why the reasons for the longstanding free speech taboo against government regulation of troublesome private speech are not implicated when addressing troublesome government speech. Third, Part V provides the theoretical justification grounded in audience rights for this restructuring of free speech doctrine. Fourth, this Part concludes by explaining why the usual remedies for problematic speech generally, and problematic government speech specifically, fail to redress the problem of government propaganda.

### A. *The Problem of Scope*

My defined scope of government propaganda may strike some as underinclusive and others as overinclusive. There are fair arguments for each criticism, and perhaps in the end my proposed definition ought to be tweaked. However, the current proposal is a workable starting point.

The proposed definition of propaganda is arguably underinclusive, as it fails to capture all the government propaganda (as traditionally defined) that may wreak havoc. Government propaganda need not knowingly or recklessly espouse a false statement of fact on a matter of public interest to undermine democracy.<sup>350</sup> Thus, this definition leaves out propaganda without verifiably false or misleading information such as whataboutism.<sup>351</sup> It also fails to capture propaganda with strong emotional appeals and not much else, such as Trump's taunting nicknames for his foes, or his numerous but vague racist comments.<sup>352</sup>

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<sup>348</sup> See *supra* notes 27–28 and accompanying text.

<sup>349</sup> See *supra* notes 31–33 and accompanying text (noting that speech regulations subject to strict scrutiny usually fail).

<sup>350</sup> For example, it is possible to belittle, and therefore undermine, the press without a false statement of fact.

<sup>351</sup> See *supra* notes 84–85 and accompanying text.

<sup>352</sup> See *supra* notes 76–82 and accompanying text (noting that some of the most effective propaganda is emotional).

In short, it excludes large swaths of traditional propaganda, including some of the most emotionally effective.

Nonetheless, the proposed definition of government propaganda draws from existing tests found in free speech doctrine to ensure adjudicatory workability. At the moment, the doctrine does not include a test to separate out cognitive tricks or emotional appeals that are unacceptably manipulative from those that are not, which is why the focus is on verifiably false statements of fact. And while actual malice is not the only well-established standard for intent in free speech law, the more stringent requirement of actual malice addresses concerns about potential chill, as discussed in Part V.B. In sum, it is possible that this narrow definition puts too much weight on being workable at the expense of being effective, but if it is not workable, it cannot be effective. Tackling some of the most blatant propaganda is at least a first step.

Alternatively, this definition might be criticized as overinclusive—not because my examples of propaganda are harmless, but because making government propaganda unconstitutional can be weaponized and abused by those opposing the government. Opportunists may sue government officials, not in order to stop the flow of damaging propaganda, but in order to damage the official or their office. This calculated use of litigation, problematic in its own right, may also do more harm than good to free speech by chilling government speech that would be useful.

Although interrelated, these are two separate issues. The question of chilling government speakers is addressed in Part V.B. Among the responses is that government speech is hardy, and that the actual malice standard protects against chill. But what about abuse? If the First Amendment does bar government propaganda, will the people bringing suit more likely be those trying to rein in government propaganda, or those deploying any tool available to attack the government? Right now, this is an empirical question without an answer. But there are reasons not to let fear of exploitation scuttle the proposal.

First, some risk is inevitable. That is, the risk of abuse exists for all constitutional violations by the government. Just because a constitutional right may not always be mobilized as intended does not mean that it should not be recognized. To sacrifice all the potential advantages because of the potential disadvantages would forever freeze the development of law. Given how destructive government propaganda has proven to be, it may well be worth the gamble. Or put another way, given that the government is already abusing its power vis-à-vis the public, perhaps it is worth the risk of the public abusing their new power vis-à-vis the government.

Furthermore, the concern might be overstated for any number of reasons. It may be overstated in terms of the number of abusive suits brought, as it is not clear why this constitutional limitation would generate more unjustified

litigation than others.<sup>353</sup> Moreover, existing threshold rules, such as standing,<sup>354</sup> place restrictions on who may bring suit.<sup>355</sup> The concern may be overstated in terms of the effects of nuisance suits. High-profile politicians, especially the President, are already targets.<sup>356</sup> Obama, for example, faced multiple frivolous lawsuits claiming he violated the natural born citizen clause.<sup>357</sup> None went anywhere.<sup>358</sup> Finally, there are mechanisms such as Rule 11 sanctions to deal with calculated misuse of law.<sup>359</sup> If abuse does occur, laws modeled on anti-SLAPP laws—laws designed to limit “strategic lawsuits against public participation”—might also help.<sup>360</sup>

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<sup>353</sup> Like a constitutional ban on government propaganda, a constitutional ban on foreign or domestic emoluments targets government abuses that potentially derail our democracy. See U.S. CONST. art. I, § 9; *id.* art. II, § 1. Like government propaganda claims, emoluments clause claims could be strategically mobilized. Yet they have not been.

<sup>354</sup> Standing requires a particularized injury that is traceable to the government propaganda and redressable by the courts. See generally *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992). Someone who is the subject of a government lie might have standing, such as an official responsible for an election Trump claims was rife with voter fraud. Someone who is a regular recipient of government lies, such as someone following Trump or other members of his Administration on Twitter, might also have standing. The strongest case would be a regular recipient who suffered injury or sickness as a result of believing government disinformation.

<sup>355</sup> There are also specific limits on suits against the President himself. For example, the President acting in his official capacity cannot be sued for civil damages. Sonja R. West, *Suing the President for First Amendment Violations*, 71 OKLA. L. REV. 321, 331 (2018) (citing *Nixon v. Fitzgerald*, 457 U.S. 734 (1982)). However, suits for injunctions and declaratory judgments remain. See, e.g., *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 230 (2d Cir. 2019) (holding that the President violated the Free Speech Clause by blocking followers on his Twitter feed and affirming declaratory relief), *petition for cert. filed*, No. 20-197 (U.S. Aug. 20, 2020).

<sup>356</sup> Katherine A. Rymal, Comment, *Litigious Legislators: House v. Burwell and the Justiciability of Congressional Suits Against the Executive Branch*, 89 TEMP. L. REV. 191, 191 (2016) (“Throughout history, parties, politicians, and others have brought lawsuits against Presidents and executive branch officials.”).

<sup>357</sup> *Id.* at 192.

<sup>358</sup> Stephanie Mencimer, *What’s Obama’s Birther Legal Bill?*, MOTHER JONES (Jan. 26, 2010), <https://www.motherjones.com/politics/2010/01/whats-obamas-birther-legal-bill/> [<https://perma.cc/K8D4-KRPE>].

<sup>359</sup> Rule 11 of the Federal Rules of Civil Procedure allows courts to impose sanctions for frivolous litigation, including suits designed to harass. FED. R. CIV. P. 11; see also Hana Oh Chen, *Combating Baseless Patent Suits: Rule 11 Sanctions with Technology-Specific Application*, 54 JURIMETRICS 135, 151 (2014) (“The main purpose of Rule 11 is to deter baseless filings in federal district court and to ensure that allegations have both legal and factual bases.”).

<sup>360</sup> SLAPP lawsuits are meritless cases brought specifically to intimidate a speaker exercising their free speech rights. Robert T. Sherwin, *Evidence? We Don’t Need No Stinkin’ Evidence!: How Ambiguity in Some States’ Anti-SLAPP Laws Threatens to De-Fang a Popular and Powerful Weapon Against Frivolous Litigation*, 40 COLUM. J.L. & ARTS 431, 433 (2017) (describing SLAPP suits as “frivolous lawsuits aimed at muzzling criticism”). A politician hoping a baseless defamation lawsuit will silence a newspaper’s criticism is a

Alternatively, a narrower definition of government propaganda might reduce the risk of abuse. For example, requiring a false statement to be repeated a specified number of times would make it more difficult to bring a frivolous claim yet still capture much propaganda<sup>361</sup>—one of whose hallmarks, after all, is repetition. Whether such tweaking is necessary or worth the inescapable tradeoffs is currently an open question. For now, my main goal here is to suggest that the Free Speech Clause itself contains a plausible solution to the problem of government propaganda.<sup>362</sup>

### B. *The Problem of Regulation*

The proposed limit on propaganda runs counter to the longstanding suspicion of government regulation of speech—even regulation of harmful speech.<sup>363</sup> Distrust of government runs deep in free speech jurisprudence.<sup>364</sup> Generally, we cannot shake the conviction that, if allowed to regulate speech, the government will inevitably abuse its power and target unpopular speakers.<sup>365</sup> Even a well-meaning government may prove clumsy in its enforcement and chill into silence potential speakers who fear unintentionally crossing the line.<sup>366</sup> However, neither of those problems—the chilling of private

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typical example. To deter these weaponized and speech-chilling suits, over half the states have passed anti-SLAPP laws. *Id.*; see also Roni A. Elias, *Applying Anti-SLAPP Laws in Diversity Cases: How to Protect the Substantive Public Interest in State Procedural Rules*, 41 T. MARSHALL L. REV. 215, 215 (2016) (“The statutes accomplish the objective of protecting important public speech by making it easier to dismiss defamation and similar suits at an early stage.”). In addition to shifting costs (to discourage suits), Anti-SLAPP laws protect speech by creating procedures to allow quick dismissals. Sherwin, *supra* note 361, at 433. I would note that anti-SLAPP statutes are meant to help David against Goliath, which is not quite the story of someone suing the government.

<sup>361</sup> *Cf. supra* note 151 and accompanying text (describing the *Washington Post*’s “bottomless Pinocchio” rating).

<sup>362</sup> An exhaustive examination of all the nuts and bolts of any such cause of action is beyond the scope of this Article.

<sup>363</sup> See Robert C. Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 CALIF. L. REV. 297, 334 (1988) (“[D]istrust of government power to regulate speech . . . forms the very justification for the amendment.”).

<sup>364</sup> Frederick Schauer, *The Second-Best First Amendment*, 31 WM. & MARY L. REV. 1, 2 (1989) (“Not only the first amendment, but also the very idea of a principle of freedom of speech, is an embodiment of a risk-averse distrust of decisionmakers.”).

<sup>365</sup> *Cf. Verstraete & Bambauer, supra* note 1, at 150 (“[S]peech regulation has an ugly history; it tends to be deployed to suppress minority and marginalized communities[.]”).

<sup>366</sup> *Cf. United States v. Alvarez*, 567 U.S. 709, 723 (2012) (“The mere potential for the exercise of that power casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom.”).

speech or the government targeting of private speakers<sup>367</sup>—arise with a free speech right against government propaganda.

### 1. *Chilling Private Speakers*

Government regulation might lead to self-censorship, thereby chilling speakers from exercising their right to speak. Indeed, the fear of such chill is a principle reason for the Supreme Court's antipathy towards content-based regulations of private speech,<sup>368</sup> including laws outlawing harmful lies. It was why the Supreme Court struck down Alabama's strict defamation law in *New York Times v. Sullivan*<sup>369</sup>: If newspapers reporting on those in power could be held liable for errors, "would-be critics of official conduct may be deterred from voicing their criticism . . . [and] make only statements which 'steer far wider of the unlawful zone.'"<sup>370</sup> Because mistakes are unavoidable in debate, free speech doctrine must ensure "breathing space" that allows people to make them.<sup>371</sup> The Court repeated this sentiment about the need for "breathing space" when it struck down the Stolen Valor Act, a federal law that banned people from falsely boasting they had earned a Medal of Honor.<sup>372</sup> Thus, lies, including damaging lies, are generally protected to avoid inadvertently chilling potentially valuable truthful speech.<sup>373</sup> It raises the question: Instead of ensuring a free flow of accurate information, might making government propaganda unconstitutional discourage the free flow altogether?<sup>374</sup>

The first crucial point is that there is no need to worry about chilling private speakers because the speakers are not private, but governmental.<sup>375</sup> The usual concern is that private speakers, anxious their mistakes will lead to government

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<sup>367</sup> Cf. David S. Han, *Categorizing Lies*, 89 U. COLO. L. REV. 613, 646 (2018) [hereinafter Han, *Categorizing*] ("[A]ny content-based regulation of fake news would create massive risks of chilling effects and government abuse.").

<sup>368</sup> See *supra* notes 31–32 and accompanying text.

<sup>369</sup> *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 300 (1964) (Goldberg, J., concurring).

<sup>370</sup> *New York Times*, 376 U.S. at 279; see also *id.* ("A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable 'self-censorship.'").

<sup>371</sup> *Id.* at 271–72.

<sup>372</sup> *United States v. Alvarez*, 567 U.S. 709, 750 (2012) (Alito, J., dissenting) (noting that even if "false statements . . . do not merit First Amendment protection for their own sake," they should be protected to "ensure sufficient 'breathing space' for protected speech").

<sup>373</sup> Varat, *supra* note 1, at 37 ("[M]ost scholars seem to believe that the risk of increased circulation of falsehoods is worth the sacrifice to avoid the chilling effects that permitting sanctions for falsehoods would have on the circulation of true statements.").

<sup>374</sup> Cf. Richard L. Hasen, *A Constitutional Right to Lie in Campaigns and Elections?*, 74 MONT. L. REV. 53, 56 (2013) ("Laws targeted at false campaign speech regulate political speech at the core of the First Amendment and run the risk of doing more harm than good.").

<sup>375</sup> Moreover, *Garcetti* established that government speech made pursuant to official duties enjoys no Free Speech Clause protection. See *supra* notes 101–02 and accompanying text. Certain governmental speakers, therefore, have already been shorn of free speech protections.

sanctions, opt instead not to speak at all.<sup>376</sup> But with government propaganda there is no risk-adverse private speaker uncertain about government enforcement; indeed, the government is not the enforcer but the speaker.<sup>377</sup>

In any event, government speech, like commercial speech, is less susceptible to chill. Despite the default rule that the Free Speech Clause protects even false and misleading statements of fact,<sup>378</sup> no such protection is deemed necessary for false or misleading commercial speech.<sup>379</sup> Commercial speech needs less protection because it is hardy;<sup>380</sup> profits depend on commercial speech like advertising.<sup>381</sup> Government speech is also hardy; without it, government could not function.<sup>382</sup> Commercial speakers also need less breathing room for error. Because their advertisements usually describe their own products and services, commercial speakers are uniquely positioned to verify the accuracy of their claims.<sup>383</sup> Government speakers acting in their official capacity are similarly situated. Because these government speakers are usually discussing their own domain, they are well positioned to verify the accuracy of information within their control.<sup>384</sup> Consequently, just like chill-resistant commercial speech, chill-resistant government speech can withstand more regulation.<sup>385</sup>

The risk of chill is further mitigated by the actual malice standard. In fact, the Supreme Court in *New York Times v. Sullivan* adopted the actual malice standard as the solution to the specter of chill.<sup>386</sup> The actual malice standard

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<sup>376</sup> See *supra* notes 366–74 and accompanying text.

<sup>377</sup> Well, strictly speaking the courts, a branch of government, may eventually become involved.

<sup>378</sup> *United States v. Alvarez*, 567 U.S. 709, 722 (2012). Only if the false speech is proved to directly cause harm, such as fraud or defamation, might it be constitutional to regulate. See *id.* at 719.

<sup>379</sup> See *supra* notes 124–27 and accompanying text.

<sup>380</sup> *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 564 n.6 (1980) (“[C]ommercial speech, the offspring of economic self-interest, is a hardy breed of expression[.]”).

<sup>381</sup> See *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 439 (1993) (“[C]ommercial speech is more durable than other types of speech, since it is ‘the offspring of economic self-interest.’”).

<sup>382</sup> See *supra* notes 35–38 and accompanying text.

<sup>383</sup> *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976) (“The truth of commercial speech, for example, may be more easily verifiable by its disseminator than, let us say, news reporting or political commentary, in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else.”).

<sup>384</sup> Even if this trait does not characterize all government speech, it does generally characterize the government propaganda I propose to make unconstitutional.

<sup>385</sup> Cf. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 576 (2001) (Thomas, J., concurring) (noting that commercial speech is “less likely to be ‘chilled by proper regulation.’”); *U.S. Healthcare, Inc. v. Blue Cross of Greater Phila.*, 898 F.2d 914, 939 (3d Cir. 1990) (describing commercial speech as “chill-resistant”).

<sup>386</sup> See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 282 (1964).



guarantees the press enough breathing space to avoid damaging self-censorship.<sup>387</sup> Since the press is only liable for making false statements it knows or strongly suspects are false, it will speak more freely.<sup>388</sup> If this provides sufficient breathing room for the newspapers to do their jobs, then it ought to be sufficient for government employees to do theirs.<sup>389</sup> This is especially true given the greater hardness of government speech.<sup>390</sup> Finally, as Justice Breyer observed, “[t]he dangers of suppressing valuable ideas are lower where, as here, the regulations concern false statements about easily verifiable facts.”<sup>391</sup> Indeed, given the actual malice standard, as well as the verifiably false one, it seems that the most likely speech to get chilled may well be negligently made falsehoods to the public, which would not be such a loss.<sup>392</sup>

## 2. Targeting Private Speakers

Government regulation may also equal government censorship if the government targets its critics.<sup>393</sup> Thus, another reason so much wariness surrounds government regulation of harmful speech is the fear that government will abuse its power.<sup>394</sup> “The tendency of officials to abuse their public trust is a theme that has permeated political thought from classical times to the present.”<sup>395</sup> Indeed, much of free speech jurisprudence assumes that the

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<sup>387</sup> See *id.* at 271–72.

<sup>388</sup> See *id.* at 271–72, 279–80.

<sup>389</sup> Other safeguards that exist to prevent abusive lawsuits could also be developed, such as the anti-SLAPP laws discussed earlier. See *supra* note 360 and accompanying text. Even assuming some abuse is inevitable, throwing the baby out with the bathwater may not be the best solution.

<sup>390</sup> Furthermore, repercussions of chilling press speech are greater than chilling government speech. We need press speech as a check on the power of the government. Government speech, on the other hand, is the power that needs checking.

<sup>391</sup> *United States v. Alvarez*, 567 U.S. 709, 732 (2012) (Breyer, J., concurring). Moreover, as David Han points out, “[t]he more objectively verifiable the statement in question, the lesser this degree of uncertainty, and thus the lesser the chilling effects.” See Han, *Categorizing*, *supra* note 367, at 624.

<sup>392</sup> See Han, *Categorizing*, *supra* note 367, at 639 (“We care far less—if at all—about chilling lies as opposed to chilling truthful speech.”).

<sup>393</sup> See *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 764 (noting that “unbridled discretion” would allow government to “censor certain viewpoints”).

<sup>394</sup> Cf. *Stone-Erdman*, *supra* note 1, at 415 (“Allowing political leaders to suppress speech with which they disagree on the grounds that it is fake news invites a dystopian society reminiscent of Orwell’s *Oceania* from 1984.”).

<sup>395</sup> James Madison, Speech in the Virginia State Convention of 1829–’30, on the Question of the Ratio of Representation in the Two Branches of the Legislature (Dec. 2, 1829), in *LETTERS AND OTHER WRITINGS OF JAMES MADISON, FOURTH PRESIDENT OF THE UNITED STATES, 1829-1836*, at 51 (J.B. Lippincott & Co. 1865) (“The essence of Government is power; and power, lodged as it must be in human hands, will ever be liable to abuse.”); Vincent Blasi, *The Checking Value in First Amendment Theory*, 3 AM. B. FOUND. RES. J. 521, 529 (1977).

government will abuse its power,<sup>396</sup> and is therefore structured to minimize government control over speech.<sup>397</sup>

The government may abuse its power to regulate speech in different ways.<sup>398</sup> Most relevant for this Article, the government may exploit its enforcement discretion to target speakers.<sup>399</sup> For example, if lies in general were outlawed, government officials might selectively prosecute their opponents or detractors. As Justice Breyer warned in *Alvarez*, “prohibition[s] may be applied . . . subtly but selectively to speakers that the Government does not like.”<sup>400</sup> However, with the free speech right against government propaganda, the targeted speaker *is* the government, not private speakers. The fear of silencing government critics is beside the point when the regulated speaker is not a private person but the government itself.

Moreover, this free speech right against government propaganda only becomes mobilized when the government is already abusing its power by knowingly or recklessly disseminating false information on matters of public concern. Rather than a prospective abuse of power, government propaganda represents an actual abuse of power. The “government abuse” ship has already sailed. Thus, a First Amendment right against government propaganda is not giving the government a tool it may potentially abuse. Rather the right creates a tool to limit actual government abuse.

Despite the potential benefits, the Supreme Court has shied away from regulating harmful private speech like lies due to the potential downsides, including the targeting or chilling of private speakers.<sup>401</sup> But these major

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<sup>396</sup> See Geoffrey R. Stone, *Ronald Coase's First Amendment*, 54 J.L. & ECON. 367, 371 (2011) (“The Framers . . . fully appreciated the danger that those in authority would suppress speech in order to control public discourse, insulate themselves from criticism, and perpetuate themselves in power.”).

<sup>397</sup> Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression*, 81 NOTRE DAME L. REV. 1347, 1348–49 (2006) (“[T]he content approach to analyzing free speech . . . reflects a basic distrust for government regulation of speech[.]”).

<sup>398</sup> The government may, for example, outlaw discussion of disfavored topics. Subjecting content-based regulations to strict scrutiny presumably checks this kind of abuse. See *supra* notes 31–32 and accompanying text.

<sup>399</sup> Note that this potential abuse differs from the one discussed in Part V.A. There, the fear was that plaintiffs would abuse a free speech right against government propaganda to the detriment of government speech. This section focuses on the more traditional fear of the government abusing its power to regulate private speech, and why that concern does not arise with a constitutional right against government propaganda.

<sup>400</sup> *United States v. Alvarez*, 567 U.S. 709, 737 (2012) (Breyer, J., concurring).

<sup>401</sup> Opponents of hate speech regulation invoke similar concerns. See, e.g., Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 539 (1990) (“Once the government is allowed to punish any speech based upon its content, free expression exists only for those with power.”). However, not all scholars agree. See, e.g., Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2321–22 (1989) (“A legal response to racist speech is a statement that victims of racism are valued members of our polity.”).

obstacles to the regulation of harmful speech are not implicated by the regulation of government propaganda. Consequently, while these fears present a barrier, and for many an insurmountable barrier, for regulating private propaganda,<sup>402</sup> they pose no bar to finding that government propaganda violates the Free Speech Clause.

### *C. The Problem of Justification*

Another challenge is to explain why the First Amendment should even reach government speech when the Supreme Court has emphatically declared that it does not. One reason usually given for why the Free Speech Clause does not apply to government speech is that the government must be able to control the content of its own speech.<sup>403</sup> As the Supreme Court has noted more than once, the government could not function otherwise.<sup>404</sup> Another reason is that the Free Speech Clause is meant to protect private speakers from the government, not the government from itself.<sup>405</sup> But neither reason precludes applying the Free Speech Clause to government propaganda; in fact, both point towards it. In other words, barring government propaganda better promotes free speech goals than allowing it, so that the free speech right against government propaganda is well grounded in basic First Amendment values.

#### *1. Government Does Not Need to Propagandize*

Clearly, the government needs to exert control over its own speech. As the Supreme Court has stated, “When a government entity embarks on a course of action, it necessarily takes a particular viewpoint and rejects others. The Free Speech Clause does not require government to maintain viewpoint neutrality when its officers and employees speak about that venture.”<sup>406</sup>

But a democratic government can, and should, operate without propagandistic disinformation. As defined here, propaganda does not refer to persuasive efforts like government campaigns to convince people to give up smoking. On the contrary, public education campaigns represent exactly the

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<sup>402</sup> Just as scholars disagree about regulating private hate speech, scholars disagree about regulating private propaganda. Compare Levi, *supra* note 1, at 238 (“The Article does not recommend express governmental attempts to prohibit or limit ‘fake news’ directly.”), with *see generally* Beschle, *supra* note 1 (describing scholars who advocate a proportionality test for deliberate lies).

<sup>403</sup> See *supra* notes 34–38 and accompanying text.

<sup>404</sup> See *supra* notes 34–38 and accompanying text.

<sup>405</sup> See Mark G. Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863, 867 (1979) [hereinafter Yudof, *Toward*] (“The historic purpose of the first amendment has been to limit government[.]”). The third reason offered, that the appropriate remedy for problematic government speech is the political process, is addressed in the next section on alternative remedies. See *infra* Part V.D.

<sup>406</sup> *Matal v. Tam*, 137 S. Ct. 1744, 1757 (2017).

kind of viewpoint-based government speech the Supreme Court had in mind.<sup>407</sup> However, rather than the government staking out a position on a matter of contested public opinion, government propaganda involves disseminating a false statement on an uncontested matter of fact.

The government's propaganda does not amount to harmless white lies either. Courts and commentators have argued against classifying lies in general as an unprotected category of speech in part because lies can be beneficial.<sup>408</sup> In *Alvarez*, Justice Breyers listed many examples, such as avoiding a friend's embarrassment or protecting a child's innocence.<sup>409</sup> "Perhaps it is socially desirable, after all, that many children and some adults believe in Santa Claus and the tooth fairy."<sup>410</sup> In other words, lies are not always bad.

But the government lying to the citizenry about matters of public interest is not beneficial.<sup>411</sup> As explained above, government propaganda decreases accountability and increases the odds of falsified consent.<sup>412</sup> It also sows distrust in the government and government institutions generally<sup>413</sup>—polls show that trust in government has reached record lows<sup>414</sup>—and this distrust is regarded as a precursor to lower democratic engagement.<sup>415</sup> "Increasingly, social scientists

<sup>407</sup> See *supra* note 35 and accompanying text.

<sup>408</sup> See *United States v. Alvarez*, 567 U.S. 709, 733 (2012) (Breyer, J., concurring) (discussing how lies can sometimes "serve useful human objectives").

<sup>409</sup> *Id.* (arguing that false factual statements "may prevent embarrassment, protect privacy, shield a person from prejudice, provide the sick with comfort, or preserve a child's innocence").

<sup>410</sup> Frederick Schauer, Memorial Lecture, *Facts and the First Amendment*, 57 UCLA L. REV. 897, 901 (2010) [hereinafter Schauer, *Facts*].

<sup>411</sup> *Id.* at 902 ("[I]t seems relatively uncontroversial to assert that, in general, truth is, *ceteris paribus*, better than falsity, that knowledge is, *ceteris paribus*, better than ignorance, and that a society with more true belief is, *ceteris paribus*, better than one with less belief in the truth or than one with more beliefs that are actually false.").

<sup>412</sup> See *supra* Part IV.A.

<sup>413</sup> See, e.g., Michael J. Stern, *Thanks, Trump: I Worked for Government for 25 Years, Now I Can't Believe Anything It Says*, USA TODAY (Jan. 9, 2019), <https://www.usatoday.com/story/opinion/2019/01/09/donald-trump-lies-destroying-government-trust-respect-column/2512384002/> [<https://perma.cc/ECT6-SC3X>] ("I've always had a healthy skepticism for the shades of truth that come from both Democratic and Republican administrations. Now, my default setting is to assume that what my government tells me is a lie.").

<sup>414</sup> See, e.g., Asked in September 2018 about their level of trust and confidence in the executive branch, 37% responded "none at all"—the highest number ever since the question was first asked in 1972 (before Watergate). *Trust in Government*, GALLUP, <https://news.gallup.com/poll/5392/trust-government.aspx> [<https://perma.cc/MV27-G82P>].

<sup>415</sup> See John Feffer, *Donald Trump's War on Democracy*, NATION (Sept. 24, 2018), <https://www.thenation.com/article/donald-trumps-war-on-democracy/> (on file with the *Ohio State Law Journal*) ("The most dangerous part of Trump's onslaught on democracy is the cynicism it's likely to generate," which might cause people to "decide that voting isn't worth it, politics is a game best avoided, and Twitter is superior to a newspaper. Democracy doesn't just die in darkness. It can die of indifference—not with a bang or a whimper, that is, but with a yawn.").

are viewing such trust as a fragile good, necessary to human cooperation and effective government, yet as vulnerable as our natural environment to being cumulatively polluted.”<sup>416</sup> In sum, our government need not, and should not, undertake to intentionally or recklessly lie to us.

Quite the opposite, the government arguably has a responsibility to tell us the truth. Scholars such as Helen Norton have maintained that the government, with its greater power and access to knowledge,<sup>417</sup> holds a fiduciary relationship with the public.<sup>418</sup> Accordingly, “the public (as beneficiary) [should] expect the same loyalty from its government as it would from other fiduciaries. The government’s self-interested lies to its public can thus breach the public’s trust in, and expectations of loyalty from, its government.”<sup>419</sup> Whether a fiduciary or not, people should be able to trust that their government is being honest with them.<sup>420</sup> This seems particularly true with role models, like the President of the United States.

Consequently, the default assumption should be that government propaganda, as defined above, has no legitimate role in governance. Perhaps it could be justified if some national security emergency required it. In that case, the government propaganda would satisfy strict scrutiny.<sup>421</sup> But even if some government lies might survive, most would fail.

Thus, the first reason offered for why government speech is not subject to the Free Speech Clause—that the government needs to be able to control its speech, including making viewpoint-based determinations of its content—does not clash with a rule that presumes that government propaganda violates the First Amendment.

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<sup>416</sup> Sissela Bok, *Lies: They Come with Consequences*, WASH. POST, Aug. 23, 1998, at C01.

<sup>417</sup> Norton, *The Government’s Lies*, *supra* note 23, at 79 (noting information where “the government has a monopoly or to which it has other special access”).

<sup>418</sup> *Id.* at 81 (“Drawing from private law’s imposition of fiduciary obligations upon those who have discretionary power over the interests of others, this growing body of literature observes that government actors assert the same sort of power with respect to the public[.]”).

<sup>419</sup> *Id.* at 81–82 (footnote omitted); *see also* D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671, 707 (2013) (“The idea that political representatives are fiduciaries is a venerable one, deeply embedded in political theory[.]”).

<sup>420</sup> Helen Norton, *(At Least) Thirteen Ways of Looking at Election Lies*, 71 OKLA. L. REV. 117, 125 n.33 (2018) (“Government is in some sense a trust; there is a special relationship between government and people, and it is a violation of this conception for secrecy or falsehood to come between trustee and people.”) (citing BERNARD WILLIAMS, *TRUTH AND TRUTHFULNESS* 210 (2002)).

<sup>421</sup> Norton, *The Government’s Lies*, *supra* note 23, at 88 (“[T]he government’s decision should survive [strict] scrutiny when necessary to achieve compelling government interests—for example, to calm public panic in a public safety emergency or to prevent a criminal from hurting a victim.”).

## 2. *The Free Speech Clause Protects Audiences*

The next reason for placing government speech beyond free speech limits is that the Free Speech Clause is designed to defend private speakers, not curtail government ones.<sup>422</sup> There is no denying that the Bill of Rights is meant to protect private individuals from the government.<sup>423</sup> But as this section explains, describing the Free Speech Clause as only protecting private *speakers* is an incomplete description of its scope. The Free Speech Clause has never been solely, or even primarily, about speakers. It has also always been about ensuring a free flow of information for *audiences*. Therefore, to the extent that government propaganda affects private individuals as audiences, it makes sense to subject it to the Free Speech Clause.<sup>424</sup>

The Free Speech Clause has always safeguarded audiences' right to receive information. Two of the most well-known justifications for protecting free speech—to create a marketplace of ideas and to facilitate democratic self-rule—emphasize audiences' need for the free flow of information.<sup>425</sup> The point of a speech marketplace is to provide audiences with a variety of opinions and ideas: "It would be a barren marketplace of ideas that had only sellers and no buyers."<sup>426</sup> Moreover, the political speech marketplace is a necessary precondition for the audience's effective self-government: "The public, as sovereign, must have all information available in order to instruct its servants, the government."<sup>427</sup> Consequently, although the paradigmatic free speech beneficiary is an uncensored speaker, a well-informed audience is equally central to free speech jurisprudence.

The importance of audiences and their right to receive information is well recognized. After originally being equated with commerce,<sup>428</sup> commercial speech like advertising became protected by the Free Speech Clause on the grounds that audiences would benefit from the information.<sup>429</sup> According to the

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<sup>422</sup> See Yudof, *Toward*, *supra* note 405, at 867.

<sup>423</sup> See *supra* Part II.

<sup>424</sup> The focus on audiences may also help reconcile the idea that free speech rights might actually be advanced by curtailing speech. While in some ways the First Amendment right against government propaganda is quite startling—the Free Speech Clause is being used to stop speech—in other ways it is not—the Free Speech Clause is limiting the government's speech, and the Bill of Rights are, after all, about limits on the government.

<sup>425</sup> See *supra* notes 26–28 and accompanying text.

<sup>426</sup> *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring).

<sup>427</sup> Thomas I. Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U. L.Q. 1, 14 (1977).

<sup>428</sup> *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) ("[T]he Constitution imposes no [free speech] restraint on government as respects purely commercial advertising."), *overruled by* *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748 (1976).

<sup>429</sup> *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 763 (1976) (observing that a consumer's interest in commercial information "may be as keen, if not keener by far, than his interest in the day's most urgent political debate").

Supreme Court, protection of commercial speech “is justified principally by the value to consumers of the information such speech provides[.]”<sup>430</sup> Specifically, commercial speech, if truthful and not misleading, may aid consumers with their commercial decision-making and inform their political decision-making.<sup>431</sup>

Protection for corporate political speech likewise originated with the premise that audiences should have access to a wide range of viewpoints.<sup>432</sup> All political speech is potentially helpful, and therefore all political speech, regardless of the source, must be protected.<sup>433</sup> As the Court observed in *Citizens United v. Federal Election Commission*, the First Amendment of the United States “is written in terms of ‘speech,’ not speakers.”<sup>434</sup> In short, the value of corporate political speech derives from its value to audiences.

Audiences (as opposed to speakers) have even been plaintiffs in free speech cases.<sup>435</sup> In one case brought by the recipients (rather than the senders) of mail, Justice Brennan underscored the rights of audiences, describing “the right to receive publications” as “a fundamental right” guaranteed by the Bill of Rights.<sup>436</sup> In a series of broadcasting cases, the Supreme Court even privileged audience rights over speaker rights. *Red Lion Broadcasting Co. v. FCC*, for example, upheld the FCC’s fairness doctrine requiring broadcasters to grant equal time to conflicting viewpoints, especially on controversial public issues.<sup>437</sup> The Court insisted that “[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.”<sup>438</sup>

The Supreme Court was less willing to regulate private speech in order to improve its quality outside the broadcasting context (where there is limited

<sup>430</sup> *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985); *Va. State Bd. of Pharmacy*, 425 U.S. at 756 (“[Protection of advertisement] is a protection enjoyed by the appellees as recipients of the information, and not solely, if at all, by the advertisers themselves who seek to disseminate that information.”).

<sup>431</sup> *Va. State Bd. of Pharmacy*, 425 U.S. at 764–65 (finding that in a “free enterprise economy,” information about products and prices will help people make informed economic policy decisions).

<sup>432</sup> *See First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 784 (1978) (holding that the political speech of corporations was entitled to the same degree of protection as the political speech of natural people).

<sup>433</sup> *See id.* at 777 (“[Political speech] is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.”) (footnote omitted).

<sup>434</sup> *Citizens United v. FEC*, 558 U.S. 310, 392 (2010) (Scalia, J., concurring).

<sup>435</sup> *See Lamont v. Postmaster Gen.*, 381 U.S. 301, 307 (1965) (Brennan, J., concurring) (invalidating on First Amendment grounds a requirement that the Post Office hold foreign communist propaganda until the addressee request that the mail be sent).

<sup>436</sup> *Id.* at 308 (Brennan, J., concurring).

<sup>437</sup> *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 369–71, 400–01 (1969).

<sup>438</sup> *Id.* at 390; *see also Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 635–37 (1994) (requiring cable operators to set aside “must carry” channels for designated broadcast signals) (subsequent history omitted); *CBS, Inc. v. FCC*, 453 U.S. 367, 396–97 (1981) (upholding FCC rule requiring broadcasters to grant reasonable air time to qualified federal political candidates).

bandwidth for voices),<sup>439</sup> and for the most part has retreated from prioritizing audiences. In clashes between the right of private speakers to speak and the right of private audiences to a free flow of varied information that is neither distorted nor damaging, the Supreme Court has consistently favored speakers.<sup>440</sup> Indeed, as discussed in Part V.B., a major roadblock to regulating harmful speech has been solicitude for private speakers.<sup>441</sup> The Supreme Court will not improve the quality of information that reaches audiences at the cost of possibly silencing speakers protected by the Free Speech Clause.

Although these concerns arise in the context of government regulation of private propaganda, they do not arise with government propaganda. There is no clash between private speakers' right to express themselves and private audiences' right to receive accurate information because there are no private speakers, only government ones. In other words, with government speech, there are no protected speakers, only protected audiences. Any Free Speech Clause concerns raised by regulating government propaganda would center around private audiences, and audiences are better off without it.<sup>442</sup> Consequently, the main obstacle to regulating the quality of speech—that it will infringe on speakers' rights—is not present in this scenario.

Making government propaganda unconstitutional is fully consistent with Free Speech Clause values. It would improve the free flow of information for private audiences, which has always been a central goal of the Free Speech Clause. At the same time, it never jeopardizes any free speech rights of private speakers, distinguishing it from the cases where the Supreme Court prioritized speakers over audiences.

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<sup>439</sup> See, e.g., *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (striking down the right-of-reply rule as applied to newspaper editorials).

<sup>440</sup> See, e.g., *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2378 (2018) (holding that it violated a pro-life crisis pregnancy center's free speech rights to compel them to inform customers that they are not a licensed medical facility); *United States v. Alvarez*, 567 U.S. 709, 727–30 (2012) (holding that it violated liar's free speech rights to ban lies about receiving the Medal of Honor); *Snyder v. Phelps*, 562 U.S. 443, 457–59 (2011) (holding that it violated picketers' free speech rights to hold them liable for intentional infliction of emotional distress for hateful signs near funeral). There are exceptions, such as the captive audience doctrine, which protects audiences from unwanted and unavoidable speech in places like the home when "substantial privacy interests are being invaded in an essentially intolerable manner." *Cohen v. California*, 403 U.S. 15, 21 (1971).

<sup>441</sup> See also, e.g., *Citizens United v. FEC*, 558 U.S. 310, 365 (2010) (finding financial caps on campaign spending violate speakers' free speech rights).

<sup>442</sup> Although audiences benefit if the government stops propagandizing, might they be harmed if the government self-censors, and ceases more than propaganda as defined above? Chill is unlikely, given the hardness of government speech and the breathing space afforded by the action malice standard. See *supra* Part V.B.1. Even if the government is chilled, the speech chilled is likely to be akin to propaganda, and so audiences are no worse off.



### D. *The Problem of Alternative Solutions*

Another question raised by the free speech right against government propaganda is whether less drastic alternatives are available. When addressing problematic private speech, the courts have always urged that the solution to false speech was true speech.<sup>443</sup> That is, the response to lies is not to shut them down, but to counter them with the truth instead. Perhaps that ought to be the response to government propaganda as well. Moreover, according to the Supreme Court, the cure for problematic *government* speech lies with the political process,<sup>444</sup> so that the reaction to government propaganda should not be to silence the government but to change it. Unfortunately, neither of these remedies seems to be working, making clear the need for a free speech right against government propaganda.

#### 1. *More Speech Will Not Counter Government Propaganda*

The traditional free speech remedy for problematic speech is more speech. As the Supreme Court has declared: “If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”<sup>445</sup> In the *Alvarez* case, the Supreme Court pointed out that after Alvarez lied at a public meeting, his lie was mocked online and covered by the press.<sup>446</sup> It therefore concluded that “the dynamics of free speech, of counterspeech, of refutation, can overcome the lie.”<sup>447</sup>

This optimism has long been questioned.<sup>448</sup> As Fred Schauer once quipped, “[T]he persistence of the belief that a good remedy for false speech is more speech, or that truth will prevail in the long run, may itself be an example of the resistance of false factual propositions to argument and counterexample.”<sup>449</sup>

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<sup>443</sup> See *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis & Holmes, JJ., concurring), *overruled on other grounds by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969); see also *Alvarez*, 567 U.S. at 727.

<sup>444</sup> See *supra* notes 70–71 and accompanying text.

<sup>445</sup> *Whitney*, 274 U.S. at 377; see also *Alvarez*, 567 U.S. at 727 (“The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth.”).

<sup>446</sup> *Alvarez*, 567 U.S. at 727.

<sup>447</sup> *Id.* at 726.

<sup>448</sup> See Napoli, *supra* note 1, at 67 (“The counterspeech doctrine is a pillar of First Amendment theory that rests on an intellectual foundation that is somewhat shaky, at best.”); see also Richard Delgado & David H. Yun, Essay, *Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulation*, 82 CALIF. L. REV. 871, 877 (1994) (“Finally, talking back is rarely a realistic possibility for the victim of hate speech.”).

<sup>449</sup> Schauer, *Facts*, *supra* note 410, at 910–11. Schauer also points out that the marketplace metaphor that speech and counterspeech draw on was really about a marketplace of ideas, not a marketplace of facts. *Id.* at 908–12.

Counterspeech does not always, or even usually, overcome the lie. Indeed, the Court's faith in "[t]he remedy for speech that is false is speech that is true"<sup>450</sup> has not been borne out. The truth about the 2016 election has not prevailed despite online ridicule and press coverage of Trump's lies: 25% of Americans polled agreed "[t]here is evidence that millions of fraudulent votes were cast in the 2016 presidential election" and another 30% were unsure.<sup>451</sup> Nor has counterspeech successfully refuted Trump's lie that long-standing law required him to separate undocumented parents and children at the border: 30% of Americans believe him.<sup>452</sup>

The belief that truth will triumph over government propaganda rests on at least three assumptions: that recipients will be exposed to the truth, that they will be able to distinguish truth from falsehood, and that they will replace their mistaken beliefs with the truth.<sup>453</sup> Our media landscape, with its information bubbles, cast the first in doubt.<sup>454</sup> The destabilization of truth has undermined the second assumption.<sup>455</sup> Finally, the social science establishing that beliefs are very difficult to dislodge once they have taken hold, and almost impossible if they conflict with one's worldview, makes the third one questionable.<sup>456</sup>

Whatever its success in some cases, counterspeech is too often failing to combat government propaganda.<sup>457</sup> To be fair, counterspeech is often deemed as the best hope against harmful speech, not because of its effectiveness, but on the grounds that the alternative—government regulation of private speech—

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<sup>450</sup> *Alvarez*, 567 U.S. at 727; *see also* *Brown v. Hartlage*, 456 U.S. 45, 61 (1982) (noting that the "preferred First Amendment remedy" is "more speech, not enforced silence").

<sup>451</sup> Only 44% correctly responded that there is no evidence of widespread voter fraud. WASH. POST, WASHINGTON POST FACT CHECKER POLL, NOV. 30–DEC. 10, 2018 3 (Dec. 2018), <https://apps.washingtonpost.com/g/page/politics/washington-post-fact-checker-poll-nov-30-dec-10-2018/2351/> [<https://perma.cc/S8P8-FUCR>]. Another poll found that 29% answered yes when asked if they "believed millions of illegal votes had been cast in 2016." Sam Levine & Ariel Edwards-Levy, *Almost Half of Republicans Believe Millions Voted Illegally in the 2016 Election*, HUFFPOST (May 27, 2018), [https://www.huffpost.com/entry/republicans-voter-fraud\\_n\\_5b0850f8e4b0fdb2aa53791f](https://www.huffpost.com/entry/republicans-voter-fraud_n_5b0850f8e4b0fdb2aa53791f) [<https://perma.cc/ES8G-VQ6C>]; *see also* Kauffman, *supra* note 305 (reporting that roughly half of Republicans believe that Trump won the popular vote).

<sup>452</sup> Another 27% were unsure, leaving only 41% to correctly identify that "[l]ongstanding U.S. laws did not require the separation of undocumented immigrant parents and children earlier this year." WASHINGTON POST FACT CHECKER POLL, *supra* note 451.

<sup>453</sup> *See* Napoli, *supra* note 1, at 61.

<sup>454</sup> *See id.* at 74 ("As Negroponte predicted, interactive media have allowed people to craft their own individual news diets.").

<sup>455</sup> *See supra* notes 298–306 and accompanying text.

<sup>456</sup> *See supra* notes 322–29 and accompanying text.

<sup>457</sup> *Cf.* HUNT ALLCOTT, MATTHEW GENTZKOW, & CHUAN YU, TRENDS IN THE DIFFUSION OF MISINFORMATION ON SOCIAL MEDIA 2 (Oct. 2018), <https://web.stanford.edu/~gentzkow/research/fake-news-trends.pdf> [<https://perma.cc/J99A-H7VD>] ("Media commentators have argued that efforts to fight misinformation through fact-checking are 'not working' and that misinformation overall is 'becoming unstoppable[.]'" (citation omitted)).

would be a cure worse than the disease.<sup>458</sup> But as discussed in the previous section, those issues do not arise with a constitutional limit on government propaganda.

## 2. *The Political Process Is Not the Only or the Best Check*

The Supreme Court has also suggested that the best corrective for government speech is the political process.<sup>459</sup> While the Court was referring to government viewpoints rather than government propaganda, the Court counseled that “[i]f the citizenry objects [to the government’s speech], newly elected officials later could espouse some different or contrary position” or, presumably, a truthful position.<sup>460</sup> In short, voters have the power to change problematic government speech by changing the government.

However, the political process cannot be relied upon to remedy government propaganda because, as detailed earlier, a consequence—if not the point—of government propaganda is to shut down normal political processes. The underlying assumption of our political system is that Americans express their consent or their disapproval at the ballot box. If voters’ decisions are based on lies the government has fed them, and the press cannot disabuse them of those untruths, then the consent is not genuine. Thus, even if the political process were ordinarily the most appropriate check on the speech of the political branches, it no longer is an adequate recourse to government speech calculated to undermine that process.

I do not mean that courts will effect a complete solution nor do I mean that a free speech right against government propaganda is the only solution.<sup>461</sup> Congress could also curb abuses by the executive branch, though perhaps not if controlled by the same party as the Presidency.<sup>462</sup> The constraints may even come from the private rather than the public sector.<sup>463</sup> For example, some social platforms have begun to take more seriously their responsibility to act as

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<sup>458</sup> See *supra* Part V.B.

<sup>459</sup> See *Pleasant Grove City v. Summum*, 555 U.S. 460, 468–69 (2009); see also *Walker v. Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2245 (2015).

<sup>460</sup> *Pleasant Grove City*, 555 U.S. at 468–69.

<sup>461</sup> See Norton, *The Government’s Lies*, *supra* note 23, at 108–12 (describing several potential laws to restrict government lies); see also *id.* at 112–15 (describing potential political checks on government lies).

<sup>462</sup> Cf. Lee Drutman, *Here’s the Slogan Democrats Should Run On: “Support Checks and Balances. Elect Democrats.”*, VOX (July 19, 2018), <https://www.vox.com/polyarchy/2018/7/19/17591868/democrats-slogan-checks-balances> (“The problem with separation of powers in practice is that it only works with divided government.”); *id.* (“Republicans in Congress are bending over backward and upside down and sideways to figure out how to excuse away the inexcusable[.]”).

<sup>463</sup> For example, social media platforms could tweak their algorithms to improve the rank of more accurate information and more reliable sources. Garrett, *supra* note 345, at 372–73 (describing technological approaches to fighting disinformation).

gatekeepers against disinformation.<sup>464</sup> But given that one of the main checks—the political process—is disabled by this type of propaganda, it may be wise to have another option.

Proposing a new scope for the Free Speech Clause raises all kinds of questions, both technical and practical. My goal for this Article is not to flesh out every aspect, but to establish that the Free Speech Clause itself is available as a limit on government propaganda. If nothing else, this proposal provides another way to think about government propaganda: It is not only unethical, it is unconstitutional.<sup>465</sup>

## VI. CONCLUSION

Although inescapable, and not necessarily detrimental, government speech has the potential to undermine the necessary mechanisms of democracy. In particular, the government may use its megaphone to disseminate propaganda. The scope and reach of government propaganda today are unprecedented, hampering citizens' ability to hold their government accountable and undermining true consent of the governed. A free flow of information lies at the core of the Free Speech Clause, yet instead of a free flow of information strengthening our democracy, the free flow of government propaganda weakens it. The Free Speech Clause itself offers a solution: Government propaganda should be considered unconstitutional.

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<sup>464</sup> See Levi, *supra* note 1, at 285–90 (describing Facebook's efforts at self-regulation). See generally Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598 (2018).

<sup>465</sup> For example, if disseminating government propaganda violates the Constitution, then it might provide grounds for impeachment.